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In the Supreme Court of the United States

OCTOBER TERM, 1976

EARL L. BUTZ, ET AL., PETITIONERS

v.

ARTHUR N. ECONOMOU, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statement	2
Reasons for granting the writ	7
Conclusion	21
Appendix A	1a
Appendix B	23a
Appendix C	29a
Appendix D	31a

CITATIONS

Cases:

Air East, Inc. v. *National Transportation Safety Board*, 512 F.2d 1227, certiorari denied, 423 U.S. 863	20
Apton v. *Wilson*, 506 F.2d 83	9
Barr v. *Matteo*, 360 U.S. 564	6, 7, 8, 9, 10, 11, 12, 13, 14, 19
Bivens v. *Six Unknown Named Agents*, 456 F.2d 1339	9
Bradley v. *Fisher*, 13 Wall. 335	16, 17
Conley v. *Wilson*, 538 F.2d 323	8
David v. *Cohen*, 407 F.2d 1268	8
Economou v. *Department of Agriculture*, 494 F.2d 519	4

Cases—Continued

	Page
Expeditions Unlimited Aquatic Enterprises, Inc. v. *Smithsonian Institution*, C.A.D.C., decided June 28, 1976 (No. 74-1899), vacated and petition for rehearing *en banc* granted October 20, 1976	9, 13
George Steinberg & Son, Inc. v. *Butz*, 491 F.2d 988	20
Gregoire v. *Biddle*, 177 F.2d 579, certiorari denied, 339 U.S. 949	8, 12, 13
Howard v. *Lyons*, 360 U.S. 593	10
Imbler v. *Pachtman*, 424 U.S. 409	8, 10, 11, 12, 16, 17, 18, 19
Mandel v. *Nouse*, 509 F.2d 1031, certiorari denied, 422 U.S. 1008	8-9
Mark v. *Groff*, 521 F.2d 1376	9
Monroe v. *Pape*, 365 U.S. 167	10
Nadiak v. *Civil Aeronautics Board*, 305 F.2d 588, certiorari denied, 372 U.S. 913	20
Norton v. *McShane*, 332 F.2d 855, certiorari denied, 380 U.S. 981	9
Ove Gustavsson Contracting Co. v. *Floete*, 299 F.2d 655, certiorari denied, 374 U.S. 827	9
Paul v. *Davis*, 424 U.S. 693	13, 14
Peterson v. *Weinberger*, 508 F.2d 45, certiorari denied, 423 U.S. 830	9
Pierson v. *Ray*, 386 U.S. 547	9, 10, 16, 18
Scheuer v. *Rhodes*, 416 U.S. 232	6, 9, 10, 11, 13, 14, 15
Scott v. *Stansfield*, L.R. 3 Ex. 220	16
Spalding v. *Vilas*, 161 U.S. 483	8
States Marine Lines, Inc. v. *Shultz*, 498 F.2d 1146	9

Cases—Continued

	Page
United States v. *Karathanos*, 531 F.2d 26, certiorari denied, July 6, 1976 (No. 75-1402)	13
Wood v. *Strickland*, 420 U.S. 308	6, 9, 10, 11
Yaselli v. *Goff*, 275 U.S. 503, affirming *per curiam* 12 F.2d 396	16, 17

Statutes and regulations:

Commodity Exchange Act, Section 6(b), 7 U.S.C. 9	3, 4
Federal Aviation Act, 79 Stat. 779, as amended, 49 U.S.C. (Supp. V) 1429 (a)	20
Federal Insecticide, Fungicide and Rodenticide Act, 86 Stat. 985, 7 U.S.C. (Supp. V) 136d(c)(2)	20
Occupational Safety and Health Act, 84 Stat. 1596, 29 U.S.C. 655(c)	20
42 U.S.C. 1983	10, 11, 13, 15, 16
17 C.F.R. 1.10	3
17 C.F.R. 1.17	3

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The Solicitor General, on behalf of Earl L. Butz, *et al.* (the individual appellees in the court of appeals),[1] petitions for a writ of certiorari to review that portion of the judgment of the United States Court of Appeals for the Second Circuit in this case that reversed the dismissal of the complaint as to petitioners.

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[1] Due to an apparent oversight, the caption of the opinion and the judgment of the court of appeals does not include Donald A. Campbell, the Judicial Officer of the Department of Agriculture, who was named as a defendant in this action. We are informed that the court of appeals is in the process of amending the judgment to correct this mistake.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-22a) is reported at 535 F.2d 688. The opinion of the district court (App. B, *infra*, pp. 23a-28a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, pp. 29a-30a) was entered on April 23, 1976. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on July 23, 1976 (App. D, *infra*, pp. 31a-32a). On October 14, 1976, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including November 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether federal government officials have an absolute rather than a qualified immunity from suit for damages based upon their performance of official duties in connection with administrative enforcement proceedings.

STATEMENT

This is a suit seeking damages of $32 million from employees of the Department of Agriculture based upon their actions in initiating and conducting, allegedly wrongfully and maliciously, an administrative enforcement proceeding for violations by respondent

of the Commodity Exchange Act. The district court dismissed the suit, holding that the employees had absolute immunity from suit for acts done as part of their official duties. The court of appeals reversed, ruling that the employees' immunity was only qualified, not absolute.

1. Respondent Arthur N. Economou Co., Inc., which is controlled by respondent Economou (respondents are hereinafter referred to as "respondent"), was registered with the Department of Agriculture as a trader in commodities futures (C.A. App. 12a).[2] As such it was required to maintain the minimum capital balance prescribed by the Secretary of Agriculture. 17 C.F.R. 1.17; see *id.* at 1.10.

In February 1970, following a routine audit of respondent by the Commodity Exchange Authority, petitioner Lyng, Assistant Secretary of Agriculture, issued an administrative complaint pursuant to Section 6(b) of the Commodity Exchange Act, 7 U.S.C. 9, alleging that respondent, while a registered futures commission merchant, willfully failed to maintain that balance (C.A. App. 12a-13a), and directing respondent to show cause why its registration should not be revoked. Following another audit, an amended complaint was issued alleging additional failures to meet the minimum capital requirements (*id.* at 13a). After a hearing, petitioner Bain, the

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[2] "C.A. App." refers to the appendix to the appellees' brief in the court of appeals, a copy of which we are lodging with the Clerk of the Court.

Chief Hearing Examiner of the Department, sustained the complaint in August 1971 (*ibid.*).

On January 15, 1973, petitioner Campbell, the Judicial Officer of the Department, to whom the Secretary has delegated his authority to decide enforcement proceedings under the Commodity Exchange Act (C.A. App. 3a; see 7 U.S.C. 9), affirmed the hearing examiner's decision and suspended respondent's registration for 90 days (see *Economou* v. *Department of Agriculture*, 494 F.2d 519 (C.A. 2)). In March 1974, the court of appeals vacated the order of the Judicial Officer on the ground that "the essential finding of willfulness * * * was made in a proceeding instituted without the customary warning letter," which rendered the finding of willfulness "erroneous on the record taken as a whole, and the sanctions imposed unwarranted." *Ibid.*

2. During the pendency of respondent's administrative appeal to the Judicial Officer from the hearing examiner's decision, respondent filed the present suit seeking $32 million damages. The defendants were the Department of Agriculture and the Commodity Exchange Authority, and the petitioners here, who are the former Secretary of Agriculture, the Assistant Secretary of Agriculture, various officials and auditors of the Authority who were involved in the administrative enforcement action, and the Chief Hearing Officer and Counsel of the Department (C.A. App. 10a-19a). An amended complaint added as a defendant petitioner Campbell, the Department's Judicial Officer.

The amended complaint alleges principally that the defendants conspired to deprive respondent of property without due process of law by wrongfully and maliciously instituting the administrative proceedings against him.[3] The complaint alleges that respondent had not willfully violated the Act, that he had not been given notice and an opportunity to correct the alleged deficiencies prior to the institution of enforcement proceedings, and that the proceedings should not have been instituted since respondent had ceased operating as a futures commission merchant. The complaint also alleges that the defendants knowingly issued false and deceptive press releases in connection with the administrative proceedings. The complaint asserts that the defendants took these actions for the purpose of ruining respondent's business, in retaliation for his outspoken criticism of the regulatory activities of the Authority.

After respondent twice sought unsuccessfully to enjoin the Department's administrative proceeding (C.A. App. 1a-7a, 20a-21a) and following the court of appeals' vacation of the Judicial Officer's order (see *supra*, p. 4), the defendants moved to dismiss the complaint on the grounds that the individual defendants were immune from suit and that the action

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[3] We are lodging a copy of the second amended complaint (see App. A, *infra*, p. 5a) with the Clerk of the Court. It includes a claim for trespass, but the allegations are conclusory (see App. B, *infra*, pp. 23a-24a n. 1), and peripheral to the principal thrust of respondent's case. The trespass claim was not mentioned by the court of appeals in its description of the complaint (see App. A, *infra*, pp. 3a-4a).

against the Department of Agriculture and the Commodity Exchange Authority was barred by sovereign immunity. As a part of the government's opposition to one of the earlier motions for an injunction, a detailed affidavit had been filed describing the actions taken by each individual defendant in the administrative proceedings that formed the basis of the judicial complaint (C.A. App. 10a-19a).[4] On May 22, 1975, the district court dismissed the suit, holding that the individual defendants were absolutely immune and that sovereign immunity barred the suit against the Department of Agriculture and the Commodity Exchange Authority (App. B, *infra*, pp. 23a-28a).

The court of appeals affirmed the dismissal as to the Department and the Authority but reversed as to the individual defendants (petitioners here) and remanded for further proceedings (App. A, *infra*, pp. 1a-22a). The court stated with respect to official immunity (*id.* at 8a) that "[h]ad *Barr* [v. *Matteo*, 360 U.S. 564] represented the last word in this evolving area, we might be inclined, as was the district court, to follow it in this case." But the court of appeals, relying largely upon its reading of *Scheuer* v. *Rhodes*, 416 U.S. 232, and *Wood* v. *Strickland*, 420 U.S. 308, concluded (App. A, *infra*, p. 20a) that "the individual defendants do not require and are not entitled to absolute immunity * * *." Instead, the court held (*ibid.*) that petitioners could "avail

[4] With respect to petitioner Butz, the affidavit states (C.A. App. 14a) that "[h]e has not been directly involved in any of the actions alleged in the complaint herein."

themselves of the defense of qualified 'good faith, reasonable grounds' immunity of the type approved by the Supreme Court in *Scheuer* and *Wood*."

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the scope of the immunity from suit for damages that federal government officials have for alleged torts committed in the performance of their official duties. In *Barr* v. *Matteo*, 360 U.S. 564, this Court held that those officals have absolute immunity. The question is whether, as the court of appeals ruled, subsequent decisions of this Court holding that state officials sued under the Civil Rights Act have only a qualified immunity have so undermined *Barr* as to require that federal officials also have only that immunity. The case also presents the related question whether government officials engaged in the preparation, trial and adjudication of administrative proceedings have absolute immunity from suit similar to that of judges and prosecutors.

The government submits that, contrary to the view of the court of appeals, *Barr* has not been undermined by the subsequent decisions involving state officials, and that its rationale is no less compelling today than when it was decided. Accordingly, we urge that federal officials should continue to have the absolute immunity recognized in *Barr*. We also contend that the basis of the traditional absolute immunity of judges and prosecutors is no less applicable to officials performing substantially identical

functions in administrative proceedings; they also require absolute immunity in order to insure "the vigorous and fearless performance of * * * [their] duty that is essential to the proper functioning of the * * * [regulatory] system" (*Imbler* v. *Pachtman*, 424 U.S. 409, 427-428).

1. a. In *Barr* v. *Matteo*, *supra*, the plurality opinion held that the acting director of an agency had an absolute immunity from a suit for damages arising out of a defamatory press release that he had issued in his official capacity. The rationale was that it is "important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government" (360 U.S. at 571).

The doctrine of official immunity recognized in *Barr* rests upon long standing precedent (360 U.S. at 570-574; see *Spalding* v. *Vilas*, 161 U.S. 483; *Gregoire* v. *Biddle*, 177 F.2d 579 (C.A. 2), certiorari denied, 339 U.S. 949). It has been generally followed by the lower courts, which have applied it in a wide variety of contexts. *E.g.*, *Conley* v. *Wilson*, 538 F.2d 323 (C.A. 4), petitions for a writ of certiorari pending, Nos. 76-206 and 76-381; *David* v. *Cohen*, 407 F.2d 1268 (C.A.D.C.); *Mandel* v. *Nouse*, 509 F.2d 1031 (C.A. 6), certiorari denied, 422 U.S.

1008; *Norton* v. *McShane*, 332 F.2d 855 (C.A. 5), certiorari denied, 380 U.S. 981; *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655 (C.A. 2), certiorari denied, 374 U.S. 827; *Peterson* v. *Weinberger*, 508 F.2d 45 (C.A. 5), certiorari denied, 423 U.S. 830. There have been a few exceptions. See *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution* (C.A.D.C.), decided June 28, 1976 (No. 74-1899), vacated and petition for rehearing *en banc* granted October 20, 1976; *Apton* v. *Wilson*, 506 F.2d 83 (C.A.D.C.); *Bivens* v. *Six Unknown Named Agents*, 456 F.2d 1339 (C.A. 2); *Mark* v. *Groff*, 521 F.2d 1376 (C.A. 9); *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146 (C.A. 4).

The court of appeals here stated (App A, *infra*, p. 8a) that it "might be inclined, as was the district court, to follow [*Barr*] in this case * * *," "[h]ad *Barr* represented the last word in this evolving area * * *." But the court of appeals concluded that *Barr* had been *sub silentio* overruled or limited to its specific facts by the subsequent decisions in cases such as *Scheuer* v. *Rhodes*, 416 U.S. 232, *Wood* v. *Strickland*, 420 U.S. 308, and *Pierson* v. *Ray*, 386 U.S. 547. Thus, although the court left undisturbed the district court's finding (App. B, *infra*, p. 28a) that the allegedly tortious conduct of petitioners was "both within the scope of their authority and discretionary," it ruled that petitioners had only a qualified immunity of the kind applied in *Scheuer* and *Wood*.

Contrary to the assumption of the court of appeals, the subsequent decisions of this Court have not

overruled or undermined *Barr*. *Scheuer*, *Wood*, and *Pierson* involved suits against state executive officials sued under 42 U.S.C. 1983. In determining the scope of those officials' immunity in that context, the Court had "to take into account * * * the purposes of 42 U.S.C. 1983" (*Scheuer* v. *Rhodes*, *supra*, 416 U.S. at 243), a statute explicitly intended to give a remedy to one who is deprived of a constitutional right by state officials (see *Monroe* v. *Pape*, 365 U.S. 167). Those considerations were not present in *Barr* and are not present in this case.[5]

Recognizing that it did not "write on a clean slate" with respect to 42 U.S.C. 1983, the Court in *Scheuer* v. *Rhodes*, *supra*, 416 U.S. at 243, began its analysis by stating: "It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute." See also *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 433-434 (concurring opinion of Mr. Justice White); *Wood* v. *Strickland*, *supra*, 420 U.S. at 315.[6] In contrast, as the Court in *Scheuer*

[5] In cases against state officials the Court has looked initially to state common law in determining their immunity, see *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 418-424; *Pierson* v. *Ray*, *supra*, 386 U.S. at 555, whereas the immunity of federal officials depends upon federal law, see *Barr* v. *Matteo*, *supra*; *Howard* v. *Lyons*, 360 U.S. 593.

[6] In *Imbler* v. *Pachtman*, *supra*, the Court held that a state prosecutor was absolutely immune from a suit under 42 U.S.C. 1983 arising out of the performance of his duty to initiate and pursue a criminal prosecution. However, as Mr. Justice White pointed out in his concurring opinion: "It is manifest * * * that all state officials as a class cannot be immune absolutely from damage suits under 42 U.S.C. § 1983 and that to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create. * * * Thus, * * * the Court has not extended *absolute* immunity to such officials in the absence of the most convincing showing that the immunity is necessary" (424 U.S. at 433-434, emphasis in original; see *id.* at 436-437). Similarly in *Wood* v. *Strickland*, *supra*, 420 U.S. at 322, the Court stated that the extension of absolute immunity to the state officials in that case would "deny much of the promise of § 1983."

pointed out (416 U.S. at 247), *Barr* v. *Matteo* arose "[i]n a context other than a § 1983 suit." Neither *Barr* nor this case involves a cause of action under a statute, like 42 U.S.C. 1983, that is intended to provide a remedy against individual government officials. Thus, in this case, unlike *Scheuer* and *Wood*, the Court does not have to "take into account" a legislative enactment that is inconsistent with absolute immunity.

The reasoning that underlies *Barr* continues to be valid and supports absolute immunity for petitioners. The actions of petitioners for which damages are sought were all taken within the scope and as part of their duties to enforce the Commodity Exchange Act. Unlike *Barr*, where the question whether the official's act was "within the outer perimeter of [his] line of duty" was considered "a close one" (360 U.S. at 574, 575), the acts complained of here are at the core of petitioners' responsibilities. Enforcement of regulations is an essential function of the executive branch.

Judge Learned Hand explained the problem many years ago in *Gregoire* v. *Biddle, supra,* 177 F.2d at 581 (quoted in *Barr* v. *Matteo, supra,* 360 U.S. at 571), when he stated that "an official, who is in fact guilty of using his powers [maliciously] * * *, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery."[7] But there is no way in which unjust complaints can be avoided. Often "it is impossible to know whether the claim is well founded until the case has been tried * * *" (*ibid.*),[8] and even then an official "may * * * find himself hard put to it to satisfy a jury of his good faith" (*ibid.*). Consequently, even the blameless official who is sued would often be subjected "to the burden of a trial and to the inevitable danger of its outcome" (*ibid.*).

It is easy for persons who believe they have been unfairly treated by government officials to charge that those officials acted "maliciously" in performing their duties. It is the threat of such claims that

[7] Although there must be means to punish and deter misconduct by government officials, "other sanctions than civil tort suits [are] available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner" (*Barr* v. *Matteo, supra,* 360 U.S. at 576).

[8] As the Court explained in *Imbler* v. *Pachtman, supra,* 424 U.S. at 419, n. 13, absolute immunity "defeats a suit at the outset," whereas "[t]he fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial."

is likely "appreciably [to] inhibit the fearless, vigorous, and effective administration of policies of government." *Barr* v. *Matteo, supra,* 360 U.S. at 571. For these reasons, "it has been thought * * * better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation" (*Gregoire* v. *Biddle, supra,* 177 F.2d at 581).

This Court has not overruled *Barr;* to the contrary, the Court recently cited it with seeming approval. See *Scheuer* v. *Rhodes, supra; Paul* v. *Davis,* 424 U.S. 693.[9] In the cases involving state officials the Court has stressed that a qualified immunity was necessary to protect the rights granted in 42 U.S.C. 1983 (see p. 10 and n. 6, *supra*). If *Barr* is no longer viable, it is this Court, and not the court of appeals, that should so announce.[10]

b. The allegation in respondent's complaint that petitioners' conduct deprived him of his property without due process of law does not call for a dif-

[9] As Judge Leventhal concluded in his dissenting opinion in *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution, supra,* slip op. 13: "There is too much to be said for the *Barr* choice, there is too much hard work and hard thought when the problem was faced squarely by great judges like John Harlan and Learned Hand, to sweep it aside as the detritus of a doctrine that has been nibbled away *sub silentio.*"

[10] As the Second Circuit has stated on other occasions (*e.g., United States* v. *Karathanos,* 531 F.2d 26, 33 (C.A. 2), certiorari denied, July 6, 1976 (No. 75-1402)): "'[W]e continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions * * *.'"

ferent result.[11] Respondent's complaint here involves basically only a charge of malicious prosecution and libel. The fundamental character of that claim is not altered because respondent has added the allegation that the conduct constituting those torts denied him due process. Such a charge can almost always be made in any tort claims case, and the form in which the pleading is drafted cannot obscure the true nature of the claim.[12]

c. If contrary to our submission, this Court's subsequent decisions have overruled or limited *Barr* v. *Matteo*, then we submit that the qualified immunity that state executive officials have under *Scheuer* v. *Rhodes* provides inadequate protection for federal officials, and that the Court should address the question of the scope and meaning of qualified immunity

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[11] Respondent does not identify the "property" interest which he alleges the petitioners' conduct denied him. He has not been denied any property interest in his license to conduct business as a futures commission merchant, since the court of appeals vacated the administrative order suspending that license. To the extent respondent relies upon injury to his business reputation, that is not a "property" interest protected by the due process clause. See *Paul* v. *Davis*, *supra*.

[12] Respondent's principal claim in his complaint appears to be that the allegedly malicious conduct of government officials damaged his business reputation to his economic detriment. That interest is similar to, and certainly no greater than, that involved in *Barr*, in which the complaint alleged that damage to personal reputation resulted from a defamatory press release. Indeed, part of respondent's claim here rests upon an allegedly defamatory press release and, to that extent, is virtually identical to the claim in *Barr*.

in the federal context. The qualified immunity recognized in *Scheuer*, which requires "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief" (416 U.S. at 247-248), would as a practical matter frequently subject federal officials to a full trial and possible liability whenever their official actions are subsequently held erroneous.

That result would be inconsistent with the underlying reason for immunity in this area—"the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability" (*Scheuer* v. *Rhodes*, *supra*, 416 U.S. at 239). *Scheuer* itself stated (*id.* at 249) that the cases there "present[ed] no occasion for a definitive exploration of the scope of immunity available to state executive officials * * *." *A fortiori*, *Scheuer* did not definitively define the immunity of federal officials. If those officials have only a qualified immunity, they require broader protection than the Court outlined in *Scheuer* for state officials sued under 42 U.S.C. 1983.

2. This case presents the additional important question whether federal government officials have absolute immunity from suits for damages for their actions in prosecuting and adjudicating administrative enforcement proceedings. Judges and prosecutors traditionally have had absolute immunity for acts done in the performance of their judicial and prosecutorial functions. The same policy reasons that underlie that immunity also require absolute immun-

ity for federal officials performing comparable functions in administrative enforcement proceedings.

The absolute immunity of judges and prosecutors is well settled. *Bradley* v. *Fisher*, 13 Wall. 335; *Yaselli* v. *Goff*, 275 U.S. 503, affirming *per curiam* 12 F.2d 396 (C.A. 2); see *Pierson* v. *Ray*, *supra*, and *Imbler* v. *Pachtman*, *supra* (holding that judges and prosecutors have absolute immunity even in suits under 42 U.S.C. 1983). In *Bradley* v. *Fisher*, *supra*, 13 Wall. at 347, the Court explained that "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom * * *." As this statement indicates, the immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public" (*Scott* v. *Stansfield*, L.R. 3 Ex. 220, 223, quoted in *Pierson* v. *Ray*, *supra*, 386 U.S. at 554), which has a strong interest in the independent and fearless performance of duty by "judicial officer[s]."

The need for absolute, as opposed to qualified, immunity stems in part from the practical consideration that the nature of the adjudicatory function—the resolution of controversies, some of which involve large personal or financial stakes as well as difficult legal and factual questions—makes the adjudicator a

particularly likely and vulnerable target for attack by individuals who consider themselves aggrieved by his judgment. See *Bradley* v. *Fisher*, *supra*, 13 Wall. at 348.

The absolute immunity of prosecutors similarly "is grounded on principles of public policy." *Yaselli* v. *Goff*, *supra*, 12 F.2d at 406. The Court in *Imbler* v. *Pachtman*, *supra*, was concerned that a qualified immunity, although it would permit redress for the genuinely wronged, would expose "even * * * the honest prosecutor" to a "substantial danger of liability" (424 U.S. at 425), with consequences that would "disserve the broader public interest" (*id.* at 427). The likelihood of unfounded litigation and the exposure to liability, the Court feared, "would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust" (*id.* at 423).

These considerations are equally applicable to officials performing prosecutorial and judicial functions in administrative enforcement proceedings. They, too, are likely to be deterred from the vigorous and uninhibited initiation, prosecution and decision of enforcement proceedings—which are essential to the effective functioning of federal regulatory programs—by the threat of "harassment by unfounded litigation" if their "case misfires" (*Imbler* v. *Pachtman*, *supra*, 424 U.S. at 423, 421). As in the case of judges and prosecutors, a qualified immunity—under which the official would be "constrained in

making every decision by the consequences in terms of his own potential liability in a suit for damages" (*id.* at 424-425)—would not be adequate to insure "the vigorous and fearless performance" of duty (*id.* at 427).

The present case compellingly illustrates the need for absolute immunity. Two of the petitioners, Judicial Officer Campbell and Hearing Examiner Bain, have been sued for their action in presiding over and deciding the administrative action against respondent.[13] The decision of the court of appeals, which exposes these officials to the threat of multi-million dollar personal liability, inevitably is likely to affect adversely the actions of all government officials whose function is to decide administrative cases.[14]

[13] As in *Pierson* v. *Ray*, *supra*, 386 U.S. 553, there is no indication that the petitioners played any role other than to decide the case before them. To the extent that their decision was erroneous, the error was subject to correction by the court of appeals—as happened in this case (see p. 4, *supra*).

[14] The court of appeals suggested (App. A, *infra*, pp. 18a-19a) that administrative law judges generally exercise less discretion than their counterparts in the judicial context, and that the outcome of administrative proceedings has less of an impact upon defendants. Administrative enforcement proceedings, however, frequently involve complex issues and require the exercise of considerable discretion by the administrative law judge. Moreover, such proceedings often involve important and hotly contested issues. Administrative proceedings authorized by the Securities and Exchange Commission against publicly-held companies, broker-dealers and accountants for violations of the securities laws, proceedings by the Food and Drug Administration against doctors and drug companies for selling unsafe or ineffective products, and actions by the Federal Trade Commission to remedy anti-

A similar analysis is applicable to those petitioners who were involved in initiating and prosecuting the enforcement proceeding.[15] They performed, in the administrative proceeding, the same functions a prosecutor performs in a judicial proceeding. These

trust violations or false advertising, are only a few examples of administrative proceedings which are closely analogous, both in their intensely adversarial context and in the effect of the sanctions imposed, to criminal trials. These proceedings often result in far-reaching and precedent-setting decisions in such fields as antitrust, securities regulation, consumer protection and public health, which are of major importance to the regulation of the industries involved.

The court of appeals also seemed to suggest (*id.* at 19a-20a) that the separation of powers principle is an additional ground for the absolute immunity of judges which does not apply to administrative law judges. But prosecutors, who are members of the executive branch, have essentially the same immunity as judges. The question of immunity is not to be determined by "judicial fiat that officials in different branches of government are differently amenable to suit" (*Imbler* v. *Pachtman*, *supra*, 424 U.S. at 421) or by reference to the title of an individual's office; it is "the duties with which the particular officer * * * is entrusted * * * which must provide the guide in delineating the scope of the * * * executive officer['s] * * * immunity from * * * suit[ ]" (*Barr* v. *Matteo*, *supra*, 360 U.S. at 573-574).

[15] This includes petitioner Lyng, Assistant Secretary of Agriculture for Marketing and Consumer Services, who issued the complaint; petitioner Caldwell, who participated in the initiation of prosecution; petitioner Davis, the administrative prosecutor; and, to the extent they participated in the prosecution, petitioners Wolkis, Robinson, Kirchhoff, and McMinn (C.A. App. 10a-19a). In addition, petitioners Caldwell, Robinson, Kirchhoff, and McMinn, who participated in the decision to initiate the investigation, also may be entitled to this immunity, since the decision to make an investigation is a preliminary step looking to the administrative enforcement proceedings.

officials also must be free to make decisions—both in initiating and in conducting an enforcement action—based upon an independent exercise of judgment, without always having to consider the possibility of substantial personal liability if their decisions should ultimately prove to have been unwise or erroneous.[16]

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[16] The court of appeals suggested (App. A, *infra*, p. 20 n. 8) that absolute immunity for those performing prosecutorial functions in the administrative context is unnecessary since administrative proceedings "of the type involved in the present case * * * usually turn more on documentary proof than the veracity of witnesses," and involve fewer "constraints of time and * * * information" than a criminal prosecution. The need for absolute immunity to allow administrative prosecutors to act vigorously exists regardless of the type of evidence used or the time constraints involved. In any event, the court's suggestion rests on dubious factual assumptions. While the issue in this particular administrative proceeding —whether the respondent maintained the minimum capital balance prescribed by regulation—may have involved largely documentary proof, many, if not most, administrative enforcement proceedings involve extensive oral testimony. See, *e.g.*, *Air East, Inc.* v. *National Transportation Safety Board*, 512 F.2d 1227 (C.A. 3), certiorari denied, 423 U.S. 863; *George Steinberg & Son, Inc.* v. *Butz*, 491 F.2d 988 (C.A. 2); *Nadiak* v. *Civil Aeronautics Board*, 305 F.2d 588 (C.A. 5), certiorari denied, 372 U.S. 913. Often they involve constraints of time comparable to those in criminal trials. See, *e.g.*, suspension proceedings under the Federal Insecticide, Fungicide and Rodenticide Act, 86 Stat. 985, 7 U.S.C. (Supp. V) 136d(c)(2), revocation of certification proceedings under the Federal Aviation Act, 72 Stat. 779, as amended, 49 U.S.C. (Supp. V) 1429(a), and proceedings for the issuance of emergency temporary standards under the Occupational Safety and Health Act, 84 Stat. 1596, 29 U.S.C. 655(c). On the other hand, many criminal proceedings involve primarily documentary evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 749—September Term, 1975

(Argued February 26, 1976 Decided April 23, 1976)

Docket No. 75-6050

ARTHUR N. ECONOMOU, PLAINTIFF-APPELLANT

—against—

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture; RICHARD T. LYNG, Assistant Secretary of Agriculture; COMMODITY EXCHANGE AUTHORITY; ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority; CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority; RICHARD E. KIRCHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority; JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture; RICHARD W. DAVIS, JR., Counsel, United States Department of Agriculture; REED MCMINN, Regional Administrator, New York Regional Office, Commodity Exchange Authority; CLEMENT GROSS, Auditor, Commodity Exchange Authority; MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority; EDWARD FITZPATRICK, Auditor, Commodity Exchange Authority,

DEFENDANTS-APPELLEES

Before: MANSFIELD, TIMBERS and MESKILL, *Circuit Judges.*

MANSFIELD, *Circuit Judge*:

Having long recognized the privilege of judges and legislators as a complete defense to civil damage actions based on their official conduct, see *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872) (judges); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (legislators),[1] the Supreme Court in recent years has focused more sharply upon the scope of the immunity to be extended to those employed by the executive branch of a government, including state prosecutors, *Imbler* v. *Pachtman*, —— U.S. ——, 44 U.S.L.W. 4250 (Mar. 2, 1976); school board members, *Wood* v. *Strickland*, 420 U.S. 308 (1975); top state officers, *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), and policemen, *Pierson* v. *Ray*, 386 U.S. 547 (1967). This appeal raises the issue with respect to the United States Department of Agriculture, the Commodity Exchange Authority ("CEA" herein), and various officials of these agencies who were sued for damages based on their alleged wrongful and malicious enforcement of the Commodity Exchange Act, 7 U.S.C. §§ 1, *et seq.*, against the plaintiffs. Judge Lloyd F. MacMahon of the Southern District of New York dismissed the damage suit on the ground that the defendants are

[1] Members of Congress are expressly protected by Art. 1, § 6 of the Constitution, which provides that, "for any speech or debate in either House, they shall not be questioned in any other place."

entitled to absolute immunity from such liability. We affirm the dismissal as to the administrative agencies on the ground that federal jurisdiction over the claims against them is lacking. In all other respects the district court's order is reversed and the case remanded for further proceedings consistent with this opinion.

On February 19, 1970, the Secretary of Agriculture, as a result of a CEA audit of Arthur N. Economou and his trading company, Arthur N. Economou Co., Inc. (collectively referred to as "appellant" herein), issued an administrative complaint pursuant to the Commodity Exchange Act, 7 U.S.C. § 9 ("the Act" herein), alleging that appellant, while a registered futures commission merchant, had failed to maintain the minimum prescribed capital balance for such activity as required by rules promulgated under the Act, see 17 C.F.R. § 1.17, and directing appellant to show cause why his registration should not be revoked. Following another such audit, an amended complaint was issued against appellant on June 22, 1970. After a hearing before a Department of Agriculture hearing examiner, at which appellant appeared *pro se*, a report adverse to appellant was issued by the examiner on August 17, 1971.

In the meantime, while the examiner's report, to which appellant excepted, was under review by the Judicial Officer of the Department of Agriculture, appellant commenced the present action for $32,000,000 damages in the district court against some 13 defendants, including the Department of Agricul-

ture, Commodity Exchange Authority, the Secretary and Assistant Secretary of Agriculture, various administrators, and officials and auditors of the CEA, and the Chief Hearing Officer and Counsel of the Department of Agriculture. The complaint alleged in substance that defendants, acting outside their discretionary duties and functions, had wrongfully and maliciously instituted the proceedings against him for the purpose of ruining his business reputation, retaliating against him for his previous outspoken criticism of the defendants' activities, and causing harm to his business. Appellant alleged that he had not wilfully violated the Act, that he had not been given notice and an opportunity to correct the alleged violations of CEA rules before the institution of the administrative proceedings against him, that the proceeding should have been terminated since he was no longer engaged in the regulated activity, and that in connection with their prosecution of that proceeding the defendants had knowingly caused deceptive press releases to be issued, which falsely indicated to the public that appellant's financial resources had deteriorated. As a result, the complaint further alleged, some of appellant's customers were no longer willing to do business with him, his credit standing was damaged, and appellant was forced to expend large sums of money to defend himself against the false charges.

The district court twice denied appellant's application for preliminary injunctive relief restraining the CEA enforcement proceeding against him. There-

after appellant chose to pursue his lawsuit in a desultory fashion, taking little or no action for long periods. While his damage action thus remained dormant, the Agriculture Department's Judicial Officer affirmed the hearing examiner's findings, whereupon appellant petitioned us for review. On March 28, 1974, we granted appellant's petition and set aside the Department's enforcement order on the ground that "the essential finding of wilfulness . . . was made in a proceeding instituted without the customary warning letter," rendering it "erroneous on the record taken as a whole, and the sanctions imposed unwarranted," 494 F.2d 519 (2d Cir. 1974).

After another long period of inaction, broken only by the district court's indication that the case might be dismissed for non-prosecution, the defendants' motion to dismiss appellant's second amended complaint was granted by Judge MacMahon on May 22, 1975, on the ground that the defendants were entitled to absolute immunity. From this decision plaintiffs appeal.

Discussion

We need not tarry over the district court's dismissal of appellant's claims against the Department of Agriculture, and the Commodity Exchange Authority, which was clearly correct. Congress has not authorized either entity to be sued in its own name, and thus we lack jurisdiction over them. See *Blackmar* v. *Guerre*, 342 U.S. 512 (1952). Nor is there any reason to accept appellant's suggestion that the complaint now be amended to name the United States

of America as a defendant, since the "intentional tort" exclusion of the Federal Tort Claims Act, 28 U.S.C. § 2680(h), would deny us jurisdiction over such claims against the United States, even though appellant's claims of malicious prosecution, abuse of process, and libel be cast in constitutional terms.[2] See *Peterson* v. *Weinberger*, 508 F.2d 45, 50 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3201 (Oct. 6, 1975).

Turning to the claims against the individual defendants, the district court based its dismissal mainly upon principles expressed in the plurality opinion of Justice Harlan in *Barr* v. *Matteo*, 360 U.S. 564 (1959), which we followed in *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655 (2d Cir. 1962). In *Barr* v. *Matteo*, the Supreme Court, by a 5 to 4 vote, held that the Acting Director of the Office of Rent Stabilization, a federal agency, was entitled to an absolute privilege against liability in damages for a defamatory press release issued by him, once it had been established that the action taken "was within the outer perimeter of [his] line of duty," even though his action was not a duty imposed on him but rather an exercise of discretion and was allegedly prompted by malice toward the plaintiff. In an opinion shared by three other justices (Frankfurter, Clark and Whittaker), Justice Harlan reasoned that an absolute privilege was required for the reason

> "that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571.

Recognizing that "there may be occasional instances of actual injustices which will go unredressed," he concluded that such a price is "a necessary one to pay for the greater good, especially since "other sanctions than civil tort suits [are] available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner," 360 U.S. at 576. Separate dissenting opinions were filed by Chief Justice Warren (in which Justice Douglas concurred) and Justices Brennan and Stewart. Accepting the view that an absolute privilege might attach to intra-agency reports or statements of Cabinet members, Justice Warren concluded that in the case of lesser officials a qualified privilege would suffice to enable them to perform their duties without undue harassment and at the same time protect a victim of their maliciously wrongful conduct.

Concluding that the alleged conduct of the defendants in the present case was "within the outer perimeter of their authority" and involved the exer-

[2] The acts of which appellant complains all occurred before March 16, 1974 when § 2680(h) was amended by Pub. L. 93-253, 88 Stat. 50, to allow suits against the United States on the basis of certain intentional torts if committed by federal "investigative or law enforcement officers." In any event, the defendants in this case do not appear to be such officers.

cise of discretion, Judge MacMahon dismissed the complaint on the ground that the defendants were entitled to immunity. Had *Barr* represented the last word in this evolving area, we might be inclined, as was the district court, to follow it in this case, despite the melange of differing views expressed by various members of the Court on the subject in that case, no one of which commanded a majority. However, the Court has since elucidated its views in a series of decisions which were neither cited by the government to the district court nor discussed by Judge MacMahon. The principles developed in these later cases lead us to the conclusion that the district court's summary dismissal cannot stand.

We start with *Pierson* v. *Ray*, 386 U.S. 547 (1967), which posed the question of whether petitioners there, black clergymen who were arrested by police for attempting to use a segregated bus terminal waiting room and tried before a municipal police justice, could recover damages in a civil action instituted by them against the judge and the police under 42 U.S.C. § 1983 after the conviction of one had been set aside and the charges against the others dropped. The Supreme Court held that the traditional absolute immunity of judges survived Congress' enactment of § 1983, and that policemen, who had never enjoyed an absolute and unqualified immunity at common law, were limited to the qualified common law immunity which had been extended to them prior to § 1983, i.e., the defense that they acted in good faith and with probable cause to believe the persons arrested had violated the law. Accordingly, the dismissal of the claims against the judge was upheld and the claims against the policemen were remanded for further proceedings.

In *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), the governor of Ohio and other high state officials, who had been sued for damages for their alleged connection with the killing of several Kent State University students by the Ohio National Guard, contended that they were entitled to absolute immunity from civil damage liability. The Supreme Court rejected this contention, unanimously holding that they were at most entitled to a qualified "good-faith, reasonable grounds" immunity, the scope of which would depend upon "the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983," 416 U.S. at 243. Speaking for a unanimous court (except for Justice Douglas who took no part in the decision), Chief Justice Burger traced the history of the development of the law of immunity of government officials from personal liability for their official acts, stating:

> "This official immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligation of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisive-

ness and the judgment required by the public good.

* * * *

"Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." [Footnotes omitted] 416 U.S. at 239-42.

Of counterbalancing importance, the Court went on to note, is the interest of the wronged individual in being compensated for harm caused him by the public official's abuse of power and invasion of his rights, for which § 1983 was enacted to provide a remedy. Noting that "It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute [42 U.S.C. § 1983]" the Court, although quoting a portion of Justice Harlan's *Barr* opinion with approval, nevertheless concluded as follows on the basis of its evaluation of the counterbalancing policy considerations:

"These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of

discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

Since the Court could not dispose of the case without a factual record based on evidence of each defendant's good faith and of the scope of his authority, it reversed the dismissal of the complaints and remanded the case for "[F]urther proceedings, either by way of summary judgment or by trial on the merits," 416 U.S. 250.[3]

The qualified "good-faith, reasonable grounds" standard was more recently reaffirmed by the Su-

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[3] Since *Scheuer*, several circuits have followed the "good faith-reasonable grounds" standard as governing the scope of immunity available to executive government officials. See *Jones* v. *Diamond*, 519 F.2d 1090, 1100-01 (5th Cir. 1975) (local elected officials); *Apton* v. *Wilson*, 506 F.2d 83 (D.C. Cir. 1974) (Justice Department officials); *Rowley* v. *McMillan*, 502 F.2d 1326, 1335 (4th Cir. 1974) (Secret Service director); *States Marine Lines* v. *Shultz*, 498 F.2d 1146 (4th Cir. 1974) (Treasury Secretary); *Burkhart* v. *Saxbe*, 397 F. Supp. 499 (E.D. Pa. 1975) (Attorney General). The defendants' reliance on our decision in *Gallela* v. *Onassis*, 487 F.2d 986, 993-94 (2d Cir. 1973), which predates *Scheuer*, is misplaced, since in *Gallela* the Secret Service defendants proved they had reasonable grounds for their action. See *id.* at 993.

preme Court in *Wood* v. *Strickland*, 420 U.S. 308 (1975), as the standard for defining the scope of immunity available to officials of the executive branch —in that case state school administrators and school board members—from civil damage liability. The issue arose when students expelled from school, claiming that the expulsion had violated their constitutional rights, sued the administrators and board members for damages. Rejecting the school officials' contention that they were entitled to absolute immunity, the majority of the Court, in an opinion by Justice White, pointed out that while legislators and judges had traditionally enjoyed such immunity at common law, the common law immunity of public school officials had been limited to "good-faith, non-malicious action taken to fulfill their official duties," even though such board members "function at different times in the nature of legislators and adjudicators in the school disciplinary process and, like the state executive officers in *Scheuer* v. *Rhodes*, *supra*, must often act promptly on the basis of information supplied by others." 420 U.S. at 318-19. The Court concluded that while some immunity was essential to prevent the conscientious school decision-maker from being deterred in exercising his judgment independently, forcefully and in the school's interest and to avoid discouraging the most capable candidates for school board position from serving because of the risk of heavy damages which they could not afford to pay, a qualified immunity would suffice. Absolute immunity, on the other hand, "would not sufficiently

increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations," 420 U.S. at 320. The immunity, said Justice White, "must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity," 420 U.S. at 321.[4]

The latest chapter in the development of principles governing the immunity of governmental officials of the executive branch is to be found in the Supreme

[4] The Supreme Court's rejection of absolute immunity for school board officials in *Wood* was unanimous. However, the Court split on the subject of what standard would govern in defining good faith. The majority concluded that in determining whether a school board member acted in good faith he would be charged with knowledge of a student's clearly established constitutional rights. Four members of the Court dissented from this aspect of the qualified immunity standard on the ground that it imposed an excessive burden on the official. Instead, the minority would have held an official immune if "in the light of the discretion and responsibilities of his office, and under all the circumstances as they appeared at the time, the officer acted reasonably and in good faith," 420 U.S. 308, even though he may have been unaware of the legal principles which governed the rights of the disciplined student.

For purposes of the present appeal, this difference is immaterial. Application to this case of the qualified immunity standard of either the majority or of the minority in *Wood* v. *Strickland* would call for reversal in the present posture of the case.

Court's very recent decision in *Imbler* v. *Pachtman*, —— U.S. ——, 44 U.S.L.W. 4250 (Mar. 2, 1976). There the Court upheld the traditional absolute immunity of a state prosecuting attorney acting within the scope of his duties from civil damage liability under § 1983 based on the allegation that he had knowingly used false testimony in the criminal prosecution of Imbler, who later brought the civil damage suit against him. The Court, noting that various courts of appeal had been "virtually unanimous that a prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his official duties,"[5] indicated that a decision regarding the immunity of an executive official must be "predicated upon a considered inquiry into the immunity historically granted the relevant official at common law and the interests behind it," 42 U.S.L.W. at 4254. In the case of the public prosecutor, his common law absolute immunity, grounded on the same principles underlying the immunity of judges and grand jurors, had been firmly established.

Speaking for 5 out of 8 members of the Court in *Imbler*,[6] Justice Powell reasoned that a qualified immunity would not give sufficient protection to the

[5] The Supreme Court cited *Fanale* v. *Sheehy*, 385 F.2d 866, 868 (2d Cir. 1967), and *Yaselli* v. *Goff*, 12 F.2d 396 (2d Cir. 1926). It also quoted with approval statements by Judge Learned Hand from his oft-cited decision in *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

[6] Justice Stevens took no part in the consideration or decision of the case.

prosecutor to enable him to engage in the independent and fearless performance of his duties which are essential to the functioning of the criminal justice system, since the prosecutor would face great difficulty in meeting a qualified immunity standard because he frequently must act under constraints of time and information, he of necessity deals with witnesses of doubtful veracity, and he must be given wide latitude in the trial of a criminal case. To expose him to the possibility of years later being required to justify his conduct or face liability in damages would unduly inhibit his performance of his duties and disserve the public. Balancing the interests at stake, the Court reasoned that the public interest in deterring misconduct would adequately be protected through criminal and professional disciplinary sanctions and that Congress did not intend in enacting § 1983 to repeal "absolute immunities so firmly rooted in the common law and supported by strong policy reason."

In a concurring opinion Justice White reasoned that, while certain absolute immunities had survived Congress' enactment of § 1983, others, which related principally to officers and employees in the executive branch, had not continued for the reason that they were not considered essential to enable the officer to perform his duties effectively. He agreed that, while absolute immunity for prosecutors is necessary to protect the judicial process and to avoid discouraging the prosecutor from performing his important duty of initiating and conducting criminal

prosecutions, it should not extend to damage suits based on his withholding or suppression of evidence, since this should not adversely affect his incentive to prosecute and would therefore not injure the judicial process.

From this recent development of the law of government officials' immunity certain conclusions may be drawn. Damage suits against government officials for abuse of governmental power frequently serve the public interest by deterring official misconduct and assuring the individual's freedom to exercise his constitutional rights, including his right to criticize his government. On the other hand, such suits may also have the purpose or effect of harassing conscientious public officers, undermining or inhibiting fearless executive performance, and deterring competent persons from accepting or continuing to hold public service positions. Since the effect of a grant of immunity is to "negate *pro tanto* the very remedy which Congress sought to create [by enactment of 42 U.S.C. § 1983] . . . the Court has not extended *absolute* immunity to such officials in the absence of a showing that the immunity is necessary," *Imbler* v. *Pachtman*, —— U.S. ——, 44 U.S.L.W. at 4258 (concurring opinion of Justice White, citing *Wood* v. *Strickland*, *supra*; *Scheuer* v. *Rhodes*, *supra*; and *Pierson* v. *Ray*, *supra*) "notwithstanding the fact that, at least with respect to high executive officers, absolute immunity from suit for damages would have applied at com-

mon law. *Spaulding* v. *Vilas*, 161 U.S. 483; *Alzua* v. *Johnson*, 231 U.S. 106," *id.*, 44 U.S.L.W. at 4258.[7]

While officials engaged in initiating and hearing administrative proceedings such as those in the present case did enjoy a considerable measure of immunity at common law, its scope was not as settled or as clear as that enjoyed by judges, legislators and prosecutors. Although federal courts leaned toward affording such officials an absolute immunity, see *Spaulding* v. *Vilas*, *supra*; *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), state courts persistently indicated, at least in dicta, that even formal action taken by an administrative tribunal could give rise to tort liability

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[7] The defendants' attempted distinction of *Scheuer* and similar cases on the ground that 42 U.S.C. § 1983, under which they were brought, is by its own terms a "substantial disavowal of a state official's right to claim immunity" must be rejected. This court has already recognized that it would be "incongruous and confusing, to say the least" to develop different standards of immunity for state officials sued under § 1983 and federal officers sued on similar grounds under causes of action founded directly on the Constitution. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1346-47 (2d Cir. 1972). Other circuits have also concluded that the Supreme Court's development of official immunity doctrine in § 1983 suits against state officials applies with equal force to federal officers sued on a cause of action derived directly from the Constitution, since both types of suits serve the same function of protecting citizens against violations of their constitutional rights by government officials. See *Apton* v. *Wilson*, *supra*, 506 F.2d at 92-93; *States Marine Lines Inc.* v. *Shultz*, *supra*, 498 F.2d at 1159; *Bethea* v. *Reid*, 445 F.2d 1163, 1166 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972).

for the officials involved if the act had been undertaken with malice. See, e.g., *Paoli* v. *Mason*, 325 Ill. App. 197, 59 N.E.2d 499 (1945); *State ex rel. Robertson* v. *Farmers' State Bank*, 162 Tenn. 499, 39 S.W.2d 281 (1931); Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263, 276-80 (1937). But see *Sweeney* v. *Young*, 82 N.H. 159, 131 Atl. 155 (1925). In some instances, administrative officials were even held liable for good faith mistakes in judgment, on the paradoxical theory that their mistake in judgment amounted to action wholly outside their jurisdiction. See, e.g., *Miller* v. *Horton*, 152 Mass. 540, 26 N.E. 100 (1891), where Justice Holmes held that a board of officials' authority to destroy diseased horses did not render them immune from damages for their destruction of a healthy horse.

The contrast between the absolute immunity clearly available at common law to judges, prosecutors, and legislators, and the somewhat confused state of the common law in regard to administrative officials reflects distinctions in the character of their respective functions. The traditional common law absolute immunity of those directly connected with the judicial and legislative processes from civil damage liability has been upheld because the possible beneficial effects of civil damage suits in deterring official misconduct on the part of such officials and in insuring free exercise of constitutional rights would be heavily outweighed by the erosion of these vital processes that such suits would engender. Because

they are frequently called upon to exercise wide discretionary powers which can have serious personal impact upon individuals and thus create an incentive to sue, judges and prosecutors would be particularly vulnerable to damage suits for malicious prosecution. Judges further would face serious personal problems in the defense of such suits. The judge would be forced either personally to bear the expense of his own defense or be put in the uncomfortable position of being defended by some other branch of the government, which might appear before him frequently as an adversary. Similarly the legislator exercises the widest of discretionary powers, the performance of which was thought important enough by the Founding Fathers to warrant a constitutional grant of immunity. To force a judge, prosecutor or legislator to assume the burden of establishing a "good faith, reasonable grounds" defense would impose an excessive burden on the functioning of the judicial and legislative process.

When it comes to suits against officials of the executive branch of a government, however, there does not appear to be any such obvious need for absolute immunity, as distinguished from a qualified immunity, to insure performance of their essential government functions. For the most part the discretionary powers of officials in the executive branch are more circumscribed than are those of legislators, prosecutors or grand jurors. Unlike the judge, the official or employee of a department of the executive branch of a state or federal government, upon being

sued for damages, would not face a conflict of interest if the state or federal government followed its usual practice of agreeing to provide him with representation by counsel drawn from the executive branch. For these reasons the trend, as reflected in *Scheuer* v. *Rhodes*, *supra*, and *Wood* v. *Strickland*, *supra*, has been toward the view that a qualified rather than absolute immunity is sufficient to insure the functioning of the executive branch and at the same time to protect the public against abuse of official power.

Applying these principles here, we are satisfied that the individual defendants do not require and are not entitled to absolute immunity in order to enable them to perform their duties. We believe that they and the performance of their executive duties are adequately protected by permitting them to avail themselves of the defense of qualified "good faith, reasonable grounds" immunity of the type approved by the Supreme Court in *Scheuer* and *Wood*.[8] If, in-

[8] While some of the Agriculture Department officials may be analogized to criminal prosecutors, in that they initiated the proceedings against appellant, and presented evidence therein, the reasons why the Supreme Court felt the public prosecutor "would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials" do not seem applicable to them. In administrative proceedings of the type involved in the present case the issues (e.g., whether the respondent maintained the minimum capital balance prescribed by regulation) usually turn more on documentary proof than the veracity of witnesses, and generally do not involve the "serious constraints of time and even information" sometimes present in criminal cases. The administrative proceedings against appellant, for instance, centered on an analysis of his financial records.

deed, the plaintiff has evidence to the effect that the proceedings against him were instituted and prosecuted maliciously and without reasonable grounds, or that the defendants knowingly caused the defamatory press releases to be issued regarding him or his company, the policy against abuse of official power requires that he be given an opportunity to prove his claim.[9] If, on the other hand, the plaintiff's claims are baseless, as defendants maintain, our holding does not necessarily require them to face an expensive, protracted or wasteful trial. Should the defendants by affidavit set forth undisputed facts demonstrating the reasonableness of their action, buttressed by affidavits of their good faith, and the plaintiff then fail to respond under oath with "specific facts showing that there is a genuine issue for trial" regarding the defendants' good faith or the existence of reasonable grounds for their action, summary judgment dismissing the complaint might be appropriate.[10] Rule 56(e), F.R.Civ.P. See *Donnelly* v. *Guion*, 467 F.2d 290, 293-94 (2d Cir. 1972), where we stated:

[9] Of course mere proof that the Department of Agriculture failed to issue a customary warning letter, which was the basis of our refusal to enforce the order, see 494 F.2d 519 (2d Cir. 1974), would not suffice to show bad faith or lack of reasonable grounds.

[10] Nor would summary judgment be precluded by our recent decisions in *Heyman* v. *Commerce & Industry Insurance Co.*, 524 F.2d 1317 (2d Cir. 1975), and *Judge* v. *City of Buffalo*, 524 F.2d 1321 (2d Cir. 1975), where genuine issues as to material facts precluded a grant of summary judgment.

> "A party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial. A summary judgment motion is intended to 'smoke out' the facts so that the judge can decide if anything remains to be tried. *See* Applegate v. Top Associates, Inc., 425 F.2d 92 (2d Cir. 1970); Dressler v. MV Sandpiper, 331 F.2d 130 (2d Cir. 1964); Radio City Music Hall Corp., supra; 6 Moore, Federal Practice ¶ 56.11 [3] at 2171-75." [Footnote omitted]

We mention this remedy not to indicate any views on the merits of such a motion, which would turn on the record before the district court, but to respond to the contention that an absolute privilege is essential to save the defendants from an excessive burden.[11]

The order is affirmed as to the claims against the Department of Agriculture and Commodity Exchange Authority. In all other respects the order is reversed and the case remanded for further proceedings consistent with this opinion.

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[11] See James, *Tort Liability of Governmental Units and Their Officers*, 22 U. Chi. L. Rev. 610, 647 (1955) (criticizing view that "the mere inquiry into malice would have worse consequences than the possibility of actual malice.")

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed, The District Court, May 22, 1953]

72 Civ. 478

ARTHUR N. ECONOMOU ET AL., PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF AGRICULTURE ET AL., DEFENDANTS

MEMORANDUM

MacMAHON, District Judge.

Defendants move, pursuant to Rule 12(b), Fed. R.Civ.P., to dismiss the second amended complaint on the ground that it is barred as to the governmental agencies by the doctrine of sovereign immunity and as to the individual governmental employees by the doctrine of official immunity.

At first blush, plaintffs' lengthy second amended complaint appears to allege ten "causes of action." Upon close examination of the second amended complaint, however, we conclude that it only makes three claims that defendants deprived plaintiffs Arthur N. Economou (ANE) and Arthur N. Economou & Co., Inc. (ANE, Inc.)[1] of their constitutional rights:

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[1] In the second amended complaint, American Board of Trade, Inc. (AMT, Inc.) appears as a plaintiff. The only

(1) defendants' decision to initiate disciplinary proceedings against plaintiffs under § 9 of the Commodity Exchange Act (Act) without first issuing a warning letter; (2) defendants' decision to continue disciplinary proceedings against plaintiffs even though they were no longer in business as futures commission merchants under the Act; and (3) defendants' issuance of inaccurate press releases concerning plaintiffs.

The defendants, the United States Department of Agriculture and the Commodity Exchange Authority, as agencies of the United States, can invoke the doctrine of sovereign immunity as a bar to suit unless congress has authorized them to be used [*sic*] in their own name.[2] Since it is undisputed that congress has not authorized either agency to be sued, we dismiss the complaint as to them.

The individual defendants, all officials of the United States Department of Agriculture or the Commodity Exchange Authority, contend that they are protected from suit by the doctrine of official immunity. In

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reference to this plaintiff is in paragraphs 25 and 26 of the second amended complaint, wherein it is alleged that defendants' acts vis-a-vis plaintiffs ANE and ANE, Inc. caused AMT, Inc. emotional burdens and resulted in trespass on its land. Those vague and conclusory allegations completely fail to establish a causal link between defendants' acts and the alleged harm to AMT, Inc. We, therefore, grant defendants' Rule 12(b) motion as to AMT, Inc. and reference to "plaintiffs" in the text will mean ANE and ANE, Inc. only.

[2] *Blackmar* v. *Guerre*, 342 U.S. 512 (1952).

order to establish this defense, defendants must show that their alleged unconstitutional acts were within the outer perimeter of their authority and discretionary.[3]

Defendants can establish that their acts were within the outer perimeter of their authority if they can show that the acts had more or less connection with the general matters committed by law to their control or supervision.[4]

The initiation and maintenance of disciplinary proceedings against commodity traders for violations of the Act and the issuance of press releases concerning such violations, defendants' alleged unconstitutional acts, were committed to defendants' control by §§ 9 and 12 of the Act. Moreover, plaintiffs admit in their second amended complaint that defendants' acts were connected to their duties under the Act. We conclude, therefore, that the individual defendants' acts were well within the scope of their authority.

Once defendants have established that their acts were authorized, they can qualify for official immunity by showing that the acts involved the exercise of discretion.[5] Authorized acts of discretion by governmental officials are immunized from suit so that such officials can make decisions while performing

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[3] *Barr* v. *Matteo*, 360 U.S. 564 (1959).

[4] *Spalding* v. *Vilas*, 161 U.S. 483 (1896). See also *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972).

[5] *Barr* v. *Matteo*, *supra*.

their duties "without fear or threat of vexatious or fictitious suits or personal liability." [6]

We turn to an examination of each act of defendants alleged to be unconstitutional in light of these principles of law to determine if the act was discretionary and, therefore, warrants immunity.

Plaintiffs contend that defendants' decision to initiate disciplinary proceedings against them for violations of the Act without first issuing a warning letter was an unconstitutional ministerial act not entitled to immunity.

The undisputed facts are that the Secretary of Agriculture, after examining a Commodity Exchange Authority audit of ANE, Inc., exercised his judgment and concluded that plaintiffs had wilfully violated the Act. He, therefore, took immediate action against plaintiffs without first issuing a warning letter.

The Secretary, in deciding whether to initiate proceedings against plaintiffs, was in a position analogous to that of a prosecutor in deciding whether to bring criminal proceedings against a defendant. Courts have uniformly held that the decision whether to prosecute a defendant is discretionary because it involves the evaluation of evidence and the exercise of judgment.[7] Since the Secretary evaluated the evidence against plaintiffs and exercised his judgment

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[6] *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655, 659 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963).

[7] *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375 (2d Cir. 1973).

prior to proceeding against them, there can be no doubt that his decision was discretionary and entitled to immunity.[8]

Plaintiffs next contend that defendants' decision to continue disciplinary proceedings against them after they had withdrawn from doing business as futures commission merchants under the Act was a ministerial act which deprived plaintiffs of their constitutional rights. Defendants contend that they interpreted the Act to require them to complete proceedings against plaintiffs in order to prevent them from obtaining a new license in the future.

In an analogous situation, it has been held that, even though a securities broker-dealer had withdrawn from doing business under the securities laws, the SEC's decision to bring public proceedings against it was a discretionary act involving the SEC's interpretation of the securities laws which it was charged with enforcing and would not be upset by the court.[9]

Since defendants' decision to continue with the proceedings involved discretionary interpretation of the

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[8] The court, in *Economou* v. *U.S. Dep't of Agriculture*, 494 F.2d 519 (2d Cir. 1974), held that the Secretary of Agriculture should have issued a warning letter to plaintiffs ANE and ANE, Inc. before filing a complaint against them because his conclusion that plaintiffs had wilfully violated the Act was not warranted from the record as a whole. We have held that the Secretary's decision not to issue a warning letter was within the scope of his authority and discretionary. As such, it is still entitled to immunity even though it has been held to be incorrect. *Boruski* v. *Stewart*, 381 F. Supp. 529 (S.D. N.Y. 1974).

[9] *M. G. Davis & Co.* v. *Cohen*, 369 F.2d 360 (2d Cir. 1966).

Act which they were charged with enforcing, the decision is entitled to immunity.

The third act by defendants which plaintiffs claim is ministerial is the issuance of several press releases allegedly containing false and misleading information about plaintiffs while defendants were proceeding against them under the Act. The issuance of press releases by governmental officials concerning administrative enforcement proceedings is a discretionary act entitled to immunity.[10]

Since the individual defendants have shown that their alleged unconstitutional acts were both within the scope of their authority and discretionary, we dismiss the second amended complaint as to them.

Accordingly, we grant defendants' motion, pursuant to Rule 12(b), Fed.R.Civ.P., to dismiss the second amended complaint as to all defendants. SO ORDERED.

Dated: New York, N. Y.
May 22, 1975

/s/ Lloyd F. MacMahon
LLOYD F. MACMAHON
United States District Judge

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[10] *Barr* v. *Matteo, supra; Federal Trade Comm'n* v. *Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of April one thousand nine hundred and seventy-six.

Present: HON. WALTER R. MANSFIELD
HON. WILLIAM H. TIMBERS
HON. THOMAS J. MESKILL
Circuit Judges

75-6050

ARTHUR N. ECONOMOU, PLAINTIFF-APPELLANT

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, EARL L. BUTZ, Secretary of Agriculture, RICHARD T. LYNG, Assistant Secretary of Agriculture, COMMODITY EXCHANGE AUTHORITY, ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority, CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority, RICHARD E. KIRCHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority, JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture, RICHARD W. DAVIS, JR., Counsel, United States Department of Agriculture, REED MCMINN, Regional Ad-

ministrator, New York Regional Office, Commodity Exchange Authority, CLEMENT GROSS, Auditor, Commodity Exchange Authority, MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority, EDWARD FITZPATRICK, Auditor, Commodity Exchange Authority, DEFENDANT-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in part and reversed in part and that the action be and it hereby is remanded to said District Court for further proceedings consistent with the opinion of this court.

A. DANIEL FUSARO
Clerk

By /s/ Vincent A. Carlen
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of July, one thousand nine hundred and seventy-six.

Present:

HON. WALTER R. MANSFIELD,
HON. WILLIAM H. TIMBERS,
HON. THOMAS J. MESKILL,
Circuit Judges.

[Filed Jul. 23, 1976, United States Court of Appeals, Second Circuit, A. Daniel Fusaro, Clerk]

Docket No. 75-6050

ARTHUR N. ECONOMOU, PLAINTIFF-APPELLANT

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture, etc., DEFENDANTS-APPELLEES

A petition for a rehearing having been filed herein by counsel for the defendant-appellees, U.S. Dept. of Agriculture, etc.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of July, one thousand nine hundred and seventy-six.

[Filed Jul. 23, 1976, United States Court of Appeals, Second Circuit, A. Daniel Fusaro, Clerk]

Docket No. 75-6050

ARTHUR N. ECONOMOU, PLAINTIFF-APPELLANT

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture, etc., DEFENDANTS-APPELLEES

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 222130 3

Supreme Court, U. S.
FILED
MAY 31 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-709

EARL L. BUTZ, ET AL., PETITIONERS

v.

ARTHUR N. ECONOMOU, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FILED NOVEMBER 19, 1976
CERTIORARI GRANTED FEBRUARY 22, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-709

EARL L. BUTZ, ET AL., PETITIONERS

v.

ARTHUR N. ECONOMOU, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX TO APPENDIX

	Page
District Court Docket Entries	2
Court of Appeals Docket Entries	6
Verified Complaint—February 2, 1972	8
Affidavit of Arthur N. Economou—February 3, 1972	15
Affidavit of T. Reed McMinn—February 14, 1972	141
Affidavit of Richard W. Davis, Jr.—February 14, 1972	142
USDA Cover Sheet in CEA Docket 167	150
Plaintiffs' Interrogatories—March 20, 1975	151
Verified (Second) Amended Complaint—March 31, 1975	156
Motion to Dismiss Second Amended Complaint—March 21, 1975	163
Order amending Caption—November 22, 1976	165
Order granting Petition for a Writ of Certiorari—February 22, 1977	166
The memorandum of the district court, dated May 22, 1975, the court of appeals' opinion and judgment, dated April 23, 1976, and the orders of the court of appeals, denying rehearing and rehearing *en banc*, dated July 23, 1976, are contained in the appendices to the petition for a writ of certiorari (Pet. App. A-D). The opinion of the court of appeals in *Economou* v. *Department of Agriculture* (petition for review of the administrative order), dated March 28, 1974 [494 F.2d 519] appears in Appendix B to the brief in opposition.	

RELEVANT DOCKET ENTRIES

CIVIL DOCKET

UNITED STATES DISTRICT COURT

TITLE OF CASE

Arthur N. Economou, Arthur Economou & Co., Inc. The American Board of Trade, Inc.

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture; RICHARD T. LYNG, Assistant Secretary of Agriculture; Commodity Exchange Authority; ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority; CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority; RICHARD E. KIRCHHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority; JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture; RICHARD W. DAVIS, JR., Counsel, United States Department of Agriculture; T. REED MCMINN, Regional Administrator, New York Regional Office, Commodity Exchange Authority; CLEMENT GROSS, Auditor, Commodity Exchange Authority; MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority; EDWARD F. FITZPATRICK, Auditor, Commodity Exchange Authority

Defendants

DONALD A. CAMPBELL, Judicial Official, U.S. Dep't of Agriculture. Deft-Appellee

DATE	PROCEEDINGS
2/2/72	FILED COMPLAINT.
2/3/72	Filed Order to Show Cause. Re: Preliminary Injunction ret. 2/15/72.
4/4/72	Filed ANSWER of defendants, to complaint.
4/20/72	Filed Memorandum & Order Accordingly pltff's motion is denied in all respects. MacMahon, J. (mailed notice).
5/3/72	Filed Notice of Appeal (mailed notice).
5/3/72	Filed Pltff. Notice of Motion. Re: Stay Proceedings. ret. 5/16/72.
5/16/72	Filed Memo. End. on motion paper dated 5/3/72. Referred to Judge MacMahon, Frankel J.
5/22/72	Filed 2nd Memo on motion paper dated 5/3/72. pltffs. motion for an injunction pending appeal of our order denying preliminary injunctive relief in this matter is denied. MacMahon, J.
12/11/72	Filed pltffs. Notice of Motion for a hearing on Dec. 15th, 1972 for leave to file an amended complaint.
12/18/72	Filed memo endorsed on motion filed Dec. 15th, 1972. MOTION GRANTED DEFT given 60 days to answer complaint. MacMahon, J.
12/29/72	Filed pltffs Affidavit & Notice of Motion for a preliminary injunction enjoining the defts et al. from any further proceedings or actions in proceeding under C.E.A. Docket No. 167 as indicated.
1/5/73	Filed MEMO. END. on notice of motion filed 12/29/72. We deny plaintiff's motions for a temporary restraining order and a preliminary injunction. So ordered. MacMahon, J.
1/12/73	Filed Notice of Appeal by Arthur W. Economou (mailed copy).
2/28/73	Filed ANSWER of defendants to Amended Complaint.
1/22/74	Filed true copy of USCA order dismissing the appeal.
3/7/75	Filed pltffs notice of motion to amend the complt. Ret. 3/21/75.
3/20/75	Filed pltffs request to defts to answer interrogs.

DATE	PROCEEDINGS
3/21/75	Filed defts notice of motion to dismiss the second amended complt. Ret. 4/4/75.
3/21/75	Filed defts memo of law in support of motion.
3/25/75	Filed Memo-End. on motion of 3/7/75. The within motion is granted on consent. So Ordered, MacMahon, J. m/n
3/31/75	Filed pltffs verified amended complt.
4/2/75	Filed pltffs reply brief.
5/14/75	Filed pltffs affdvt & notice of motion to compel disclosure. Ret. 5/23/75.
5/22/75	Filed Memorandum & Order #42465. Since the individual defts have shown that their alleged unconstitutional acts were both within the scope of their authority & discretionary, we dismiss the second amended complt as to them. Defts motion pursuant to Rule 12(b) to dismiss the second amended complt as to all defts is granted. MacMahon, J. m/n Judg'mt Ent. 5/27/75, C.
5/27/75	Filed decision & order of the Judicial Officer of U.S. Dep't of Agriculture.
3/25/75	Filed Memo-End. on motion of 3/7/75. The within motion is granted on consent. MacMahon, J.
5/23/75	Filed Memo-End. on motion of 5/14/75. The within motion by pltffs to compel defts to answer interrogs of 3/19/75 is dismissed as moot. See Memo-Dec. of this date granting defts motion to dismiss the second amended complt as to all defts. So Ordered, MacMahon, J. m/n
5/28/75	Filed Notice of Entry of Order & Memorandum #42465 by deft USA.
6/16/75	Filed pltffs notice of appeal to the USCA from the Order of Judge MacMahon, dated & entered 5/22/75, granting defts motion to dismiss the second amended complt of the pltffs as to all defts. Copy sent to: Paul J. Curran, U.S. Attorney, Att: Mel P. Barkan, Ass't U.S. Attorney, One St. Andrews Plaza, New York, N.Y. 10007.
7/7/75	Filed notice that original record on appeal has been Certified & transmitted to the USCA.

DATE	PROCEEDINGS
8/3/76	Filed Mandate & Opinion from the USCA that the order of the USDC is affirmed in part & reversed in part & that the action is remanded to the District Court for further proceedings. Clerk. Judgment Ent., 8/4/76, Clerk. n/m
9/2/76	Filed Memo-End. on unsigned Order on Mandate. The within proposed order not signed as premature, without prejudice to resubmission upon any of the following conditions: (1) expiration of the Govt's time to apply for certiorari to the Supreme Court on 10/21/76; (2) the denial of certiorari by the Supreme Court, or (3) final determination of an appeal to the Supreme Court. n/m
9/7/76	Rec'd letter of change of address for David Buxbaum, 11 B'Way Suite 1612, New York, N.Y. 10004, tel. #425-4347.
11/26/76	Filed True Copy that caption in the within action & in the opinion of this court of 4/23/76, is amended to include the name of deft-appellee Donald A. Campbell, Judicial Officer, U.S. Dep't of Agriculture. Clerk. n/m
1/27/77	Filed pltffs demand for jury trial.

SOUTHERN DISTRICT

Case No.
75-6050

TITLE OF CASE

ARTHUR N. ECONOMOU,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture; RICHARD T. LYNG, Assistant Secretary of Agriculture; Commodity Exchange Authority; ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority; CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority; RICHARD E. KIRCHHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority; JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture; RICHARD W. DAVIS, JR., Counsel, United States Department of Agriculture; T. REED MCMINN, Regional Administrator, New York Regional Office, Commodity Exchange Authority; CLEMENT GROSS, Auditor, Commodity Exchange Authority; MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority; EDWARD F. FITZPATRICK, Auditor, Commodity Exchange Authority, DONALD A. CAMPBELL, Judicial Official

Defendants-Appellees.

GENERAL DOCKET

United States Court of Appeals for the Second Circuit

DATE	FILINGS—PROCEEDINGS
6/18/75	Filed copy of docket entries and notice of appeal (Economou)
6/25/75	Received docket fee
6/25/75	David C. Buxbaum, Esq. filed form C with proof of service
6/25/75	David C. Buxbaum, Esq. filed form D w/pfs
6/26/75	Filed notice excluding ACTION from C.A.M.P.
7/7/75	Filed record (Original papers of district court)
8/26/75	Filed stipulation: deferred appendix
8/26/75	Filed briefs, appellant, with pfs
9/5/75	Filed briefs, appellee, with pfs (4 page proofs)
9/30/75	Filed printed briefs, appellee, w/pfs
10/9/75	Filed reply brief, appellant, with proof of service
12/18/75	Filed motion for leave to dispense with appendix, pfs
12/22/75	Filed order granting leave to dispense with appendix
2/26/76	Argument heard (By: Mansfield, Timbers, Meskill, C.J.J.)
4/23/76	Judgment affirmed in part, reversed and remanded in part, Mansfield, C.J.J.
4/23/76	Filed judgment
5/4/76	Filed motion for leave to extend time to file petition for rehearing and rehearing en banc, appellee, pfs
5/7/76	Filed order granting leave to extend time to file petition for rehearing and rehearing en banc to 6/7/76
6/2/76	Filed motion for leave to extend time to file petition for rehearing and rehearing en banc to 6/21/76, appellee, pfs
6/4/76	Filed order granting leave to extend time to file petition for rehearing and rehearing en banc to 6/21/76

DATE	FILINGS—PROCEEDINGS
6/21/76	Filed motion for leave to file oversized petition for rehearing, w/pfs, appellees
6/23/76	Filed order granting leave to file petition for rehearing and rehearing en banc not to exceed 15 printed pages
6/23/76	Filed petition for rehearing and rehearing en banc
7/23/76	Filed order denying petition for rehearing
7/23/76	Filed order denying petition for rehearing en banc
7/30/76	Issued mandate (opinion and judgment)
8/4/76	Original record returned to district court
8/9/76	Filed receipt of return of original record
11/22/76	Filed order that caption in the within action and in the opinion of this court of 4/23/76 be amended to include the name of defendant-appellee, "Donald Campbell"
11/26/76	Filed notice of filing of petition for writ of certiorari (SC #76-709)
2/3/77	Issued certified copy of order amending caption of case
3/2/77	Filed certified copy of order of Supreme Court granting petition for writ of certiorari

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No Summons Issued

Civil Action No.
72-478

ARTHUR N. ECONOMOU,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture; RICHARD T. LYNG, Assistant Secretary of Agriculture; Commodity Exchange Authority; ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority; CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority; RICHARD E. KIRCHHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority; JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture; RICHARD W. DAVIS, JR., Counsel, United States Department of Agriculture; T. REED MCMINN, Regional Administrator, New York Regional Office, Commodity Exchange Authority; CLEMENT GROSS, Auditor, Commodity Exchange Authority; MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority; EDWARD F. FITZPATRICK, Auditor, Commodity Exchange Authority

Defendants.

VERIFIED
COMPLAINT

1) This proceeding is brought under Section 8a (6) of the Act of May 12, 1933 (48 Stat. 31), 7 USC, Section 608a (6), as amended May 9, 1934 (48 Stat. 672), as further

amended August 24, 1935 (49 Stat. 750), and as reenacted and amended in the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (50 Stat. 246) (the said act of May 12, 1933, as reenacted and amended being hereinafter referred to as the "Act"), vesting the several courts of the United States with jurisdiction specifically to enforce and prevent and restrain any person from violating any regulation issued pursuant to the provisions of Title 1 of the Act, as well as pursuant to Sections 2201, 2202 of Title 28 of the United States Code; Sections 1361 and 2282 of the United States Code; and Section 10(b) of the Administrative Procedure Act (5 USC Section 703).

2) This is an action in equity of a civil nature brought to most urgently request the Court to intervene and assume jurisdiction at this time in the proceeding under CEA Docket No. 167 of the U. S. Department of Agriculture and its administrative agency, the Commodity Exchange Authority, to forestall and avert the substantial and irreparable damage which is impending, and also to request protection, redress and other relief from the Court against the illegal, unconstitutional, conspiratorial and criminal acts of certain of the Commodity Exchange Authority officers and employees against the plaintiff over approximately the past two and a half years. This conspiracy has reached a critical juncture, and the intervention of the Court is the plaintiff's only possible protection at this time.

3) More specifically, the plaintiff is asking the Court: a) to enjoin the defendants, initially by way of a temporary injunction and finally by a permanent injunction, from continuation in any form of the proceeding under CEA Docket No. 167; b) for declaratory judgment declaring unconstitutional certain of the rules promulgated and administrative procedures employed by the Commodity Exchange Authority; c) for declaratory judgment defining the term "willfull" as used in the Commodity Exchange Act and the rules promulgated thereunder; d) for declaratory judgment declaring illegal, improper and malicious certain documents filed by the Commodity Exchange Authority, which documents are part of the record of CEA Docket No. 167; e) for declaratory judgment declaring null and void the hearing held in connection with CEA Docket No. 167; f) for substantial redress for the severe damages and suffering inflicted upon the plaintiff by the U. S. Department of Agri-

culture and the Commodity Exchange Authority through the improper, malicious and conspiratorial acts of their officials and personnel; and g) for such other relief as the Court may deem just and proper.

4) The proceeding under CEA Docket No. 167, which is completely devoid of legal, factual or moral basis but which serves to form the nominalistic regulatory procedural framework which the defendants have used to commit illegal, unconstitutional and criminal acts against the plaintiff alleges that one of the plaintiff's companies, Arthur N. Economou & Co., Inc., and the plaintiff, as registered commission merchants, failed to meet minimum financial requirements under the Commodity Exchange Act (7 USC 6f, Supp. IV, 1969) and that we willfully violated section 4f of said Act and Section 1.17 of the rules promulgated thereunder (34 F.R. 599).

5) Plaintiff Arthur N. Economou is, and has been, an active member of the commodities markets since 1955. He is president and controlling stockholder of Arthur N. Economou & Co., Inc., a co-defendant in the aforesaid CEA proceeding, Docket No. 167; is the general and managing partner of the Economou Precious Metals Futures Trading Syndicate and The Economou Grain Futures Trading Syndicate, president and controlling stockholder of The Journal of Investment Finance, Inc., founder and president of The American Association of Commodity Traders; and president of The American Board of Trade, Inc., The American Board of Trade Service Corp., and The American Board of Trade Clearing Corp., as well as president and controlling stockholder of the Economou Financial and Development Corp.

6) The defendants are all agents or employees of the United States Department of Agriculture.

7) From 1955 to 1969, while constantly engaged in the commodities field, the plaintiff enjoyed entirely pacific relations with the Commodity Exchange Authority, and all other branches of the U. S. government. During this period the plaintiff was never a party to any law suit or proceedings. In 1969 the plaintiff caused to be brought to the attention of the CEA plans for the creation of a new commodities exchange and marketplace, The American Board of Trade, Inc., embodying operational concepts which would streamline and improve the operations of commodity trading and

provide for more orderly markets. One of the effects of The American Board of Trade, Inc., if successful, would be to make obsolete various functions of the CEA, and also make obsolete much of the CEA's personnel and practices. As a result, the defendants did immediately embark upon a criminal conspiracy to attack the plaintiff, and to destroy his reputation in the business community, thus undermining The American Board of Trade, Inc., with which the plaintiff's name and integrity are inextricably interwoven.

In pursuance of the conspiracy, among other things, the defendants falsified the financial books and records of the plaintiff's affiliated organization and published and caused to be published information they knew to be false and misleading with respect to the financial stability of plaintiff and an affiliated organization; and they have caused to be brought against plaintiff and an affiliated organization, a CEA proceeding, denominated Docket No. 167, knowing that the basis of such proceeding was untrue and that plaintiff was innocent of the charges therein set forth; and the defendants did cause the use and operations of numerous procedural stratagems, devices and other things to thwart and prevent the plaintiff from offering any effective defense in said proceeding (Docket No. 167), including the shocking promulgation of a sham referee's report which was merely a photo-copy of an interim CEA prosecution pleading, again with the purpose of defaming plaintiff's business reputation, so as to destroy the American Board of Trade, although in so doing it was necessary to deprive plaintiff of his Constitutional rights, and destroy and subvert the usual administrative procedures.

8) The actions of the defendants in furtherance of this conspiracy have and will continue to cause plaintiff substantial and irreparable loss and damage, for which there is no adequate remedy at law.

WHEREFORE plaintiff demands:

1) That the Court issue a preliminary injunction during the pendency of this action preventing and restraining the defendants, their agents, officers, attorneys, employees and successors in office and all persons acting in concert with same, and any successors in office against any further proceedings with respect to the aforesaid CEA Docket No. 167.

2) That the Court issue a permanent injunction preventing and restraining the defendants, their agents, officers,

attorneys, employees and successors in office, and all persons acting in concert with same and any successors in office against any further proceedings with respect to the aforesaid CEA Docket No. 167.

3) That plaintiff have judgment and decree of this Court declaring plaintiff's rights and status, and more particularly adjudicating

(a) That Section 1.17 of the regulations promulgated by the Secretary of Agriculture under the Commodity Exchange Act effective March 17, 1969 (34 FR599) and Section 4f of the Commodity Exchange Act (7 USC 6f, Supp. IV, 1969) violates plaintiff's Federal Constitutional rights in that by being so vague as to not inform plaintiff of what is either prohibited or required they fail to provide the "due process" required by the United States Constitution.

(b) That the term "willfully" as used in Section 6(b) of the Commodity Exchange Act, and in Section 0.3(c) of the rules thereunder, (7 USC 6f, Supp. IV, 1969) requires either a deliberate intent to violate the said regulation or a reckless disregard thereof.

(c) That the Court declare the purported referee's report of August 17, 1971, and the hearing of August 5, 1970, to August 10, 1970, a sham, and null and void.

4) That judgment be granted in the amount of $32,000,000.00. That as a result of the actions of the defendants, their agents, officers, attorneys and employees, the plaintiff suffered and will continue to suffer damages in the sum of thirty two million dollars ($32,000,000.00).

5) That this court grant plaintiff such other and further relief as may be just and proper.

Plaintiff, pro se
286 Fifth Ave., Suite 506
New York, N.Y. 10001
(212) 736-4610

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No.
00-000

ARTHUR N. ECONOMOU,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture; RICHARD T. LYNG, Assistant Secretary of Agriculture; Commodity Exchange Authority; ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority; CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority; RICHARD E. KIRCHHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority; JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture; RICHARD W. DAVIS, JR., Counsel, United States Department of Agriculture; T. REED MCMINN, Regional Administrator, New York Regional Office, Commodity Exchange Authority; CLEMENT GROSS, Auditor, Commodity Exchange Authority; MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority; EDWARD F. FITZPATRICK, Auditor, Commodity Exchange Authority

Defendants.

INDIVIDUAL VERIFICATION

Arthur N. Economou, being duly sworn, deposes and says that he is the plaintiff in the action herewith; that deponent has read the foregoing complaint and knows the contents thereof; that the same is true to deponent's own knowledge,

except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

/s/ Arthur N. Economou

Sworn to before me, this
21st day of January, 1972
/s/ Sidney Ganz
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No.
00-000

ARTHUR N. ECONOMOU,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture; RICHARD T. LYNG, Assistant Secretary of Agriculture; Commodity Exchange Authority; ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority; CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority; RICHARD E. KIRCHHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority; JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture; RICHARD W. DAVIS, JR., Counsel, United States Department of Agriculture; T. REED MCMINN, Regional Administrator, New York Regional Office, Commodity Exchange Authority; CLEMENT GROSS, Auditor, Commodity Exchange Authority; MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority; EDWARD F. FITZPATRICK, Auditor, Commodity Exchange Authority

Defendants.

AFFIDAVIT

I, Arthur N. Economou, being duly sworn, depose and say that I am a citizen of the United States, a resident of the State of New York, the plaintiff in this action and that I make this affidavit in support of my application, as plaintiff, for an order of temporary injunction against the defendants. I further depose and say:

"A"

Business Affiliations

I have been active in the commodity and financial fields since April, 1955. The following is a summary of the various closely related enterprises and activities in which I am engaged.

1) I am president and controlling stockholder of Arthur N. Economou, Co., Inc., an enterprise established in 1955 to act as commodity broker, price analyst and trading and investing account manager in the field of commodities. From approximately 1960 through December 3, 1970, the organization was registered as commission merchants with the Commodity Exchange Authority under the Commodity Exchange Act. From 1956 through 1964, I was a member of the Chicago Mercantile Exchange and acted as broker for eggs, potatoes, pork bellies and other commodities traded on that exchange.

2) I am also founder and president of The American Association of Commodity Traders, with about 1,200 members, chartered in 1965 as a non-profit educational organization. I am also editor of the official publication of the Association, the "Commodity Journal," published bi-monthly since 1965.

3) I am also general and managing partner of The Economou Precious Metals Futures Trading Syndicate, a limited partnership, units in which, in the total amount of $2,500,000, have been registered with the Securities and Exchange Commission under the Securities Act of 1933, with said registration having become effective as of March 20, 1969.

4) I am also general and managing partner of The Economou Grain Futures Trading Syndicate, a limited partnership, units in which, in the total amount of $2,500,000, were registered for sale to the public in late 1969 with the Securities and Exchange Commission under the Securities Act of 1933, but said registration was abandoned in 1971 for pertinent reasons detailed under Section "I" of this affidavit.

5) I am also president and, together with an affiliated organization, controlling stockholder of The Journal of Investment Finance, Inc., a publishing enterprise in the commodities and financial fields established mid-1970. I am

editor of two bi-weekly newsletters published by this organization—the "Silver Market Letter" and the "Foreign Exchange Letter."

6) I am also founder and president of The American Board of Trade, Inc., a new financial and commodity exchange and marketplace complex, which commenced operations in November, 1969. Since November, 1969, The American Board of Trade has provided a futures and cash market for traders and investors in silver bullion, silver coins and in seven foreign exchange markets—specifically, the Canadian dollar, British pound sterling, French franc, West German mark, Swiss franc, Italian lira and Japanese yen. In addition, the new exchange has acted as agent to its clients for the purchase of U.S. Treasury Bills of three-month and six-month maturities.

7) I am also president and, together with an affiliated organization, controlling stockholder of The American Board of Trade Service Corp., the operational arm of The American Board of Trade exchange complex, which provides the physical facilities and communications systems for execution of orders and for the sales of franchises and the design and leasing of equipment and offices for the exchange and its franchised members, and acts as specialists in providing an orderly and fluid market for the commodities traded on the ABT.

8) I am also president and, together with an affiliated organization, controlling stockholder of The American Board of Trade Corp., the accounting and bookkeeping "arm" of the new exchange complex, which provides a completely centralized accounting system for exchange transactions and maintains the accounts and records for the customers of individual exchange members, and for exchange members themselves.

9) I am also president and controlling stockholder of The Economou Financial and Development Corp., which supplies management services for The American Board of Trade, Inc., The American Board of Trade Service Corp. and The Journal of Investment Finance. The Economou Financial & Development Corp. is the affiliated organization with which I am controlling stockholder of The Journal of Investment Finance, Inc., The American Board of Trade Service Corp. and The American Board of Trade Clearing Corp., as mentioned under 5), 7) and 8) above. The Economou Financial

& Development Corp. filed a common stock issue for sale to the public in the amount of $300,000 with the Securities and Exchange Commission New York regional office under Regulation "A" of the Securities Act of 1933, and said filing was made effective by the Securities and Exchange Commission on May 26, 1970. The stock issue in the amount of $300,000, less sales expenses of approximately $30,000, was intended to provide "seed money" for the sole purpose of launching the initial stages of the new ABT exchange and marketplace complex.

• • •

"B"

Abbreviations Used in This Affidavit

"ANE & Co."—denotes Arthur N. Economou & Co., Inc.

"AACT"—denotes The American Association of Commodity Traders

"Precious Metals Syndicate"—denotes The Economou Precious Metals Futures Trading Syndicate.

"Grain Futures Syndicate"—denotes The Economou Grain Futures Trading Syndicate.

"J of F, Inc."—denotes The Journal of Investment Finance, Inc.

"ABT"—denotes The American Board of Trade, Inc.

"ABT Service"—denotes The American Board of Trade Service Corp.

"ABT Clearing"—denotes The American Board of Trade Clearing Corp.

"EF&D"—denotes The Economou Financial & Development Corp.

"CEA"—denotes the Commodity Exchange Authority, which administers the Commodity Exchange Act.

• • •

"C"

Contents of this Affidavit

1) The essential facts with respect to the issues presented by me in this action are generally set forth in the complaint which I have verified, which is filed in this action, and in which I ask the Court to intervene in the proceeding under CEA Docket No. 167 and offer me protection against and redress for the unconstitutional, conspiratorial and criminal

acts of CEA officials and personnel against me during the past 33 months.

The purpose of this affidavit is four-fold: a) to set forth certain supplemental facts of interest to the Court; b) to present the background of events relative to CEA Docket No. 167 leading up to the present application for injunctive relief, so that the Court may have a full understanding of the legal and factual issues involved; c) to set forth, for consideration by the Court, the moral and ethical issues that are also interwoven in the fabric of my controversy and struggle with the CEA; and d) to point out to the Court specific areas in CEA procedural activities that involve issues and matters of law, rather than agency "expertise," that are in dire need of legal attention and repair such as only the Court can supply; and e) to urgently request and plead with the Court to offer me the injunctive relief sought herein, in order to avert the substantial and irreparable harm and injury which now impends.

2) For the convenience of the Court in analyzing the myriad issues of law and fact that I am presenting within the aforesaid purpose of this affidavit, I am listing below the title of each section of this affidavit which follows, together with a brief descriptive statement of the subject matter of each section.

Should repetitiveness become apparent in the listing that follows, and within the overall context of this affidavit, I should like to point out that the myriad issues contained in my controversy with the CEA are so inextricably interwoven, and even interlocked that, in the writing of this affidavit, I found it impossible to present the issues neatly packaged as individual items or themes. I ask the Court's forebearance, therefore, for any repetitiveness or duplication of subject matter or issues which may become apparent in this affidavit.

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Section "D" is entitled "Record and Background of my Experience," and is devoted to an outline of my background in the commodity and financial communities from 1955 through to the present.

Section "D" starts on Page 26.

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Section "E"—"General Issues Involved"—contains an

outline of the main areas that comprise the overall schematism of the present CEA/Economou situation, which forms the basis for the complaint filed in the instant action and for the protection and redress that I am asking of the Court. Section "E" offers an overview of the general issues involved, among which are:

. . . the CEA conspiracy, and the underlying motivation that generated the illegal acts of the CEA officials and personnel;

. . . the modus operandi of the conspiracy, the principal feature of which was to synthesize and mesh the rule-making, investigatory, prosecution and judicial functions of the CEA into a monolithic attack upon me, and to completely bury and ignore the many facts and issues which I presented in our defense, as well as to totally ignore my repeated charges of illegal and unconstitutional activity by CEA officials and personnel.

. . . the particularly heinous nature of the conspiracy, in that the assault was overtly carried out in a totally fabricated pattern, nominalistically labeled as an agency "doing its duty," yet the activity had no relation whatever to the functions of the defendants under the Commodity Exchange Act and represented shocking abuse and misuse of the power of a government agency.

. . . the need for the Court to judicially assay and remedy the loosely-structured rules of the CEA to prevent similar damaging assaults in the future upon innocent persons, whereby the CEA can abrogate the due process concept of our Constitution at will in pursuit of warped, illegal and evil objectives.

Section "E" starts on Page 28.

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Section "E-1"—"Specific Issues Involved"—is devoted to a listing and brief description of the myriad issues of law and fact that are interwoven and intertwined in the framework of the CEA conspiracy, which have violated my Constitutional rights, deprived me of due process of law, caused great damage, and now threaten me with irreparable harm if the Court does not intervene at this time.

Section "E-1" starts on Page 32.

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Section "F"—"The Development of my Business Philos-

ophy"—is devoted to a discussion of the business philosophy which evolved from 1955 through 1965 as I became aware of the archaic and outworn methods and procedures traditionally used in the commodity and financial exchange community, approved and condoned by regulatory bodies, but which are harmful to the investing public and to trade interests. These realizations resulted in my resignation from the Chicago Mercantile Exchange in 1964, the founding of The American Association of Commodity Traders in 1965, and the planning and organizing of The American Board of Trade, which was launched in 1969, and in my resignation as a registered commission merchant under the Commodity Exchange Act in December, 1970.

Section "F" starts on Page 34.

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Section "G"—"The AACT"—is a write-up of the objectives of The American Association of Commodity Traders, and its programs for the dissemination of information and educational materials in its chosen field.

Section "G" starts on Page 42.

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Section "H"—"The ABT Complex"—is devoted to a description of The American Board of Trade, the new exchange and marketplace, and its operational affiliates, The American Board of Trade Service Corp., The American Board of Trade Clearing Corp., The Journal of Investment Finance and The Economou Financial and Development Corp. The ABT Exchange complex has proposed and implemented unique and innovative operational and conceptual features, which pose a threat to the established commodity exchange community as now regulated by the CEA under its own special interpretation of the Commodity Exchange Act, as well as to the CEA itself in its present functional capacity.

Section "H" starts on Page 44.

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Section "I"—"The Two Trading Syndicates"—is devoted to an overview of the conceptual aspects and operational features of The Economou Precious Metals Futures Trading Syndicate and The Economou Grain Futures Trading Syndicate, which I organized, structured into reality and registered with the Securities and Exchange Commission in 1968 and 1969, respectively. These two organizations were

an outgrowth of my experience as a commodity trading account manager, but have been rendered into stagnation by the effects of the CEA conspiracy against me.

Section "I" starts on Page 50.

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Section "J"—"ANE & Co., Inc."—is devoted to an overview of Arthur N. Economou & Co., Inc., and contains an outline of this company's plans to act as broker for both the "Precious Metals Syndicate" and the "Grain Futures Syndicate" starting in 1969, after I had phased out of my activities under the jurisdiction of the CEA, and which now is unable to function normally, owing to the vitiating effects of the CEA conspiracy.

Section "J" starts on Page 55.

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Section "K" is a detailed presentation of the "Sequence of Events and Acts" preceding and subsequent to the issuance of the complaint by the CEA in February, 1970, which signalled the initial overt step in the conspiracy against me, planned and implemented by CEA officials and personnel.

Section "K" starts on Page 57.

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Section "L" is entitled "The Mock Hearing," and describes the 3½-day hearing that took place in August, 1970, in CEA Docket No. 167, in which the referee, who issued the "referee's report" detailed under Section "M", presided. The so-called "hearing' was an integral link in the CEA conspiracy to eliminate me and the ABT from the commodity and financial community and was accordingly conducted by the referee in a totally unfair and discriminatory manner in violation of the letter and spirit of the rules and regulations of the Commodity Exchange Act and the Administrative Procedures Act, and in violation of my Constitutional rights.

Section "L" starts on Page 94.

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Section "M" is entitled "Maliciousness of the Referee's Report," and covers the extraordinary development in CEA Docket No. 167 whereby the referee, literally, photo-copied 20 pages of the CEA prosecution's brief against me and my company and presented the 20 pages as "his" findings

of fact, "his" conclusions and "his" recommendations, in the form of a so-called "Referee's Report," which traditionally and legally is a true "key" or "critical" report in an administrative proceeding. Only three pages of the referee's report, pages 1 through 3, devoted to a perfunctory and superficial "Preliminary Statement," represented "considered judicial" thinking of the referee. The remaining 20 pages, with minor alterations, were actual photocopies of the CEA prosecution attorney's brief. No mention was made in the so-called "referee's report" of our own intensive and extensive defense in the form of our Answer to the Complaint, our testimony at the hearing, and the relatively extensive briefs which we filed in CEA Docket No. 167—said briefs having been written and filed subsequent to the prosecution's brief, which the referee photocopied. Also completely ignored were our many substantiated charges of illegal and unconstitutional acts by the CEA personnel.

Section "M" starts on Page 96.

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Section "N" is entitled "The Myriad Substantive Issues Ignored By The Referee, Who Thus Abdicated His Responsibilities," and is devoted to a summary of the entire extensive spectrum of issues of fact and law left untouched and still buried in the record, without judicial appraisal or even recognition of their existence by the referee in CEA Docket No. 167.

Section "N" starts on Page 100.

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Section "O"—"Substantive Issues of Willfullness and Due Process"—sets before the Court two basic issues of law, willfullness and due process, that are intertwined within the overall pattern of the CEA's illegal acts against me in CEA Docket No. 167. By the simple expedient of simply stating that I "willfully" violated their rules, a statement unproven and factually false, the CEA could then arbitrarily abrogate the entire substantive concept of due process in our laws, in violation of my Constitutional rights. Also, the fact that evidence from the files of the CEA proves that even the most flagrantly willfull violators of their regulations are almost invariably afforded full due process procedure, violates my right to equal treatment under the

law. In addition, I question the basic Constitutionality of the CEA regulation permitting them to deprive a citizen of his right to due process by the arbitrary insertion of the word "willfull," without a judicial determination of actual willfullness, based on evidence, having been made.

Section "O" starts on Page 108.

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Section "P" is entitled "Extensive Pattern of CEA Falsifications." It sets forth the details of the series of acts by CEA officials and employees wherein they have deliberately falsified facts and figures in the record of CEA Docket No. 167 in their conspiracy to achieve their pre-determined goal of discrediting me in the financial community and bringing about my ruin and that of The American Board of Trade exchange complex.

Section "P" starts on Page 121.

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Section "Q"—"Substantial Damage Inflicted Upon Me by the CEA"—relates how the illegal, unwarranted and conspiratorial acts of this government agency adversely affected and seriously damaged my interests in the eight organizations which I created and head . . . how my career of 17 years in the field has been brought to an inglorious halt and threatened with complete destruction . . . how my carefully cultivated reputation for exemplary business conduct has been clouded by the CEA attack with the effect of undermining the public confidence which is the very foundation of my new enterprises . . . how I have lost the clear-cut competitive advantage that I enjoyed in the financial exchange community 2½ years ago when The American Board of Trade was launched, in that many of its unique and constructive concepts and operational features are now being adopted and used by other persons and entities in the field in their own plans to remedy the dysfunctions that are so glaringly manifest in the financial and commodity exchange community . . . the enormous mental and physical anguish suffered by both myself and my wife during these past two years as a result of CEA's illegal, immoral and totally undeserved attack, and the tremendous toll on our time and energy required to combat it, at the expense of both our business operations and our personal life.

Section "Q" starts on Page 125.

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Section "R" is entitled "Judicial Officer Now Joins the Conspiracy" and sets forth the facts related to the present status, or juncture, of CEA Docket No. 167, wherein the Judicial Officer of the U. S. Department of Agriculture, having received the illegal and farcical "referee's report," has established the fact that he is now ready to do his part to further the conspiracy by issuing stipulations pertaining to the impending oral arguments before him, and the filing of briefs, which are in actual violation not only of conventional legal practice but of the CEA regulations pertaining thereto, and, it goes without saying, to my great disadvantage. Thus he has continued the pattern of illegal and malicious procedure and established himself as the final link in this evil chain which was criminally forged to shackle an idea, and the man behind the idea, to the destruction of both.

Section "R" starts on Page 129.

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Section "S"—"Irreparable Harm and Damage Now Impends"—describes the pattern of substantial and irreparable harm that will engulf me if the CEA is allowed to take even a single further step in CEA Docket No. 167. The Judicial Officer, whose department has not ruled against the CEA in some 30 years, and who has already demonstrated his bad faith, must not be permitted the opportunity to administer the coup de grace to my reputation and career by nominalistically pronouncing me "guilty as charged," thereby fulfilling the agency's conspiratorial objectives. There could be no meaningful appeal from such a disaster, as later vindication could not possibly salvage or restore the wreckage of my life or career.

Section "S" starts on Page 134.

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Section "T" entitled "Effects of Injunctive Relief Totally Constructive," outlines why the relief sought herein, in averting the irreparable harm to me that now impends if the CEA is allowed to continue the proceeding under CEA Docket No. 617, will in no way harm or cause damage to any third party or to the CEA itself.

Section "T" starts on Page 139.

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Section "U"—"General"—sets forth simply that I have

tried to get the CEA to withdraw their proceedings under CEA Docket No. 167, by repeatedly pleading with them, but to no avail; and that I have not made prior application for the relief sought herein to this or any other Court.

Section "U" starts on Page 140.

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For the convenience of the Court in studying and appraising the issues and areas of fact and law involved in CEA Docket No. 167, this affidavit is presented in topical Sections, identified by capital letter and statement of the topic. I respectfully call to the Court's attention that Section "K" —entitled "Sequence of Events and Acts"—is a presentation in chronological order of developments in CEA Docket No. 167, starting early in 1969 through to the present time. Section "K", therefore, may be considered that section of this affidavit that presents the "overall story" of CEA Docket No. 167. All other Sections are related to the body of the developments and events set forth under Section "K".

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"D"

Record and Background of Experience

1) In organizing and structuring my various businesses and enterprises in the commodity and financial fields, I have worked regularly and closely these past five years with one to three highly competent attorneys on a sustained weekly consulting basis. I meet with each attorney for at least one one-hour session every week and each attorney is given an assignment which requires 3 to 4 hours of work on the outside. I also work closely with a Certified Public Accountant in setting up the various accounting systems for my organizations and working out the many problems attendant thereto.

2) In addition, in developing The American Board of Trade concepts and organizational structure, from approximately 1966 through 1969, I also worked closely with six men who possessed heavy academic backgrounds and actual experience in various disciplines, such as systems analysis, operations research, law, economics, accounting, and mathematics.

3) I should also like to call to the Court's attention that,

up until February, 1970, when the CEA issued its initial and unwarranted complaint against me and one of my companies, my entire background of experience and know-how in the legal, accounting, business organization and systems fields was used for the purpose of developing innovative and constructive patterns of activity in the world of investment and finance.

I say "constructive" patterns of activity, because not an iota of my background and knowledge in the legal, accounting, business organization and systems fields had been put to use in a law suit or litigation of any kind—until February, 1970, when I was notified of the CEA action against me in CEA Docket No. 167. In my years of experience in commodities and finance, as a broker, trading account manager, association executive, member of a leading commodity exchange, etc., I had never had a law suit filed against me, nor had there been a single law suit filed against any one of the many enterprises in which I actively participated. In addition, during that period of years, neither I nor any one of the organizations which I controlled ever filed a law suit against any person or firm.

4) During the 8 years, from 1956 through 1964, that I was a member of the Chicago Mercantile Exchange, I acted as broker and account trading manager for many hundreds of clients in speculative and investment transactions in shell eggs, frozen eggs, potatoes, onions, live cattle and pork bellies, with all trades conducted in accordance with the rules and regulations of the Chicago Mercantile Exchange as approved by the CEA. During that period, to my knowledge, the Chicago Mercantile Exchange did not receive a single complaint or protest from my roster of clients, who participated in thousands of transactions, relative to the manner in which their accounts were handled.

5) For a period of 10 years—from 1960 through October, 1969, specifically—I personally managed the trading accounts for a total of 1,500 clients, approximately, each of whom invested anywhere from $400.00 to $50,000.00 in their trading account and gave me full authority to trade on their behalf without consulting them at any time. Out of the activity of all these 1,500 clients, involving many millions of dollars in margin funds, commissions for my clearing house associates and myself, and millions of dollars of profits and losses, through numerous trading and investing campaigns,

successful and unsuccessful, over a period of 10 years, the CEA received, to my knowledge, only two minor complaints expressing dissatisfaction with the way things were handled. One was found to be without basis and the other was settled to the satisfaction of all concerned, including the CEA.

6) I should like to call to the Court's attention that of the total of 1,500 trading accounts that I personnally managed from 1960 through October, 1969, approximately *400 of the clients were in programs of activity which were not regulated or supervised by the Commodity Exchange Authority.* These commodities are referred to as "non-regulated" markets in the trade, are not covered by the Commodity Exchange Act, and include basic markets such as cocoa, sugar, rapeseed and silver. Even live cattle and pork bellies, now traded on several exchanges, were "non-regulated" markets when introduced in the commodity world in the early and mid-1960's.

The accounts of these 400 clients were carried on the books of Arthur N. Economou & Co., Inc. and these specific funds were co-mingled with the company's general cash funds, as is customary and is permitted by law in non-regulated trading accounts.

During the 10 years that these 400 non-regulated accounts were carried on my company's books and managed by me personally, involving many thousands of transactions, none of the exchanges on which the trades were implemented received, to our knowledge, any complaints or protests as to the manner that the account was being managed. We, ourselves, received only two minor complaints, both of which were adjusted to the satisfaction of the parties involved.

Throughout the 10 years of servicing the 400 non-regulated accounts, we were able to manage and service such accounts satisfactorily without supervision or regulation in any form whatever by the Commodity Exchange Authority.

* * *

"E"

General Issues Involved

In the instant action, I am asking the Court to please intervene to protect me against further concerted illegal and criminal attacks upon me by officials and employees of the

Commodity Exchange Authority and to prevent and forestall substantial irreparable damage which will occur if the Commodity Exchange Authority is allowed to proceed further in CEA Docket No. 167.

In truth and in fact, my struggle to loosen my company and myself from the unwarranted and destructive monolithic grasp of the CEA is now literally a matter of life and death for me and for the various organizations in the commodity and financial fields which I personally have created and nutured into life these past years.

It is my hope that the Court will intervene at this juncture in order to avert the irreparable damage which will occur if the CEA is permitted to take even another single step in Docket No. 167, also to properly adjudicate the substantive issues of fact and law which are interwoven in the tapestry of CEA Docket No. 167, and to offer redress for the substantive damage caused to date by the officials and personnel of the CEA.

The general issues involving illegal and criminal acts of officials and personnel of the CEA against me may be summarized as follows:

1) I hereby state that the action undertaken by the CEA in CEA Docket No. 167 and the various acts of officials and employees in connection therewith are in actuality an organized conspiracy for the specific purpose of discrediting me in the financial community and with the investing public, and, through me, to cause the downfall and destruction of The American Board of Trade Inc., a new exchange and marketplace. This conspiracy on the part of the CEA—involving deliberate manipulation and falsification of facts, figures, and definitions, and many acts on the part of the defendants which were illegal and intended for the purpose of accomplishing a vile and evil purpose, in violation of my basic Constitutional rights—is an abhorrent criminal offense on the part of the defendants.

2) I hereby state that the motivating influence underlying the CEA's decision to organize and implement a planned conspiracy to discredit me and to vitiate and destroy The American Board of Trade was the new exchange's openly-announced intention to implement unique and innovative operational concepts and features that are designed to eliminate the numerous serious dysfunctions of the present archaic exchange and marketplace systems which are in-

jurious and detrimental to the public interest and which not only would give The American Board of Trade powerful competitive advantages over the present array of exchanges and marketplaces but would also greatly reduce and even obviate completely the necessity or the need for the CEA's functions as they were envisioned by Congress 35 years ago when the Commodity Exchange Act was enacted.

3) I hereby state that one of the principal characteristics of the CEA conspiracy was an organized plan, or modus operandi, whereby the facts and issues that constitute my vigorous defense against the pure fiction and fabrications inherent in CEA Docket No. 167 would be effectively buried and completely ignored by the "judicial process" under which I am to be judged guilty or not by the CEA. As a result, I am completely helpless in the proceeding under CEA Docket No. 167 and have been and am unable to elicit so much as an acknowledgement of my defense in the proceeding in any manner whatever, let alone receive the impartial consideration of my defense to which I am entitled by law and by the Constitution. In addition, my charges and allegations of illegal and conspiratorial CEA acts against me have been completely ignored. On the other hand, the conspiratorial plan allows the CEA charges, masquerading as reality, to be supported and the record illumined by the fabricated "facts," "findings of facts" and "conclusions" of the CEA investigatory, prosecution and judicial officials and personnel that are involved in this criminal conspiracy. Their combined efforts, synchronized and in congruity, are aimed at achieving the pre-determined objective of ruining me personally and bringing about the downfall of The American Board of Trade. Thus I am confronted with a structured monolithic assault which allows for no counteraction, excludes the concept of due process under law, excludes the concept and practice of the morality and ethics involved and against which my extensive and desperate attempts to counter-posit any facts or issues in my defense are completely ignored and consigned to oblivion by the judiciary arm of the CEA. I hereby state that this monolithic assault of the CEA against me is not only a violation of my fundamental rights as a human being and a citizen, but makes a mockery of the judicial processes that supposedly are an integral part of the present Administrative Procedures Act and I herein implore the Court to intervene

and put a stop to this misapplication and abuse of powers granted to an administrative agency by our Federal laws.

4) I hereby state that the callousness of the CEA hierarchy in planning and launching the pernicious conspiracy to vitiate and destroy the American Board of Trade has not only caused substantial damage to me and my various closely-linked and integrated enterprises, and now threatens even greater and irreparable damage, but also has cast a serious cloud over the present administrative procedures of the CEA. Congress did not intend to empower an agency to create its own rules and regulations, supply the judicial interpretation thereto, carry on investigations in almost any manner it so desires, including the actual manufacture of evidence as and when needed, set up prosecution procedures on the basis of its own rules and specific objectives, and finally synthesize the judicial functions directly into that of the prosecution, so that the procedural approach represents a solid, monolithic body of action, against which there can be no defense once the juggernaught is given momentum, such as in the collective body of acts and events in CEA Docket No. 167. Least of all was it the intent of Congress that the agency use its official power to accomplish personal destructive purposes entirely outside the scope of its proper function as administrators of the Commodity Exchange Act.

Such callousness and disregard of moral and ethical issues is even more adhorrent when viewed in light of our nation's critical need currently to restructure various conceptual and operational areas of the financial community, which have been found wanting from the standpoint of the U.S. investors' needs and protection—yet the CEA can indulge itself in an illegal and criminal model of deception, presented to the financial community in the form of CEA Docket No. 167, in order to eliminate a real threat to the many outmoded and detrimental concepts which it guards with such misplaced zeal and assiduity that it actually contravenes rather than administers the basic constructive purposes and objectives of the Commodity Exchange Act, as set forth under Section 3 and Section 4a of that Act.

I implore the Court therefore, to intercede at this juncture in CEA Docket No. 167, not only to put a stop to the CEA conspiracy woven in the structure and fabric of said proceeding and to offer me protection from substantial irreparable harm which impends, but also to judicially examine

and study the agency procedures involved which enabled the CEA to deeply and effectively bury the myriad substantive issues of due process, of constitutional rights, of actual entrapment, of legality, morality and ethics—all of which I have been unable to surface in my defense these past 23 months, owing to the combined and synthesized conspiratorial efforts of the investigatory, prosecution and judicial departments of the CEA. In this manner, I respectfully suggest, the Court will be able to determine what constructive changes need be made in the Commodity Exchange Act to allow a citizen to propose and implement what he considers constructive measures, concepts and ideas without fear of being bludgeoned to death by an administrative agency jealously guarding the molding structure of outworn methods and operations that long ago served a purpose but today result in dysfunctions that are injurious to investors, to trade groups and to the economy of our nation.

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Specific Issues Involved

The following is simply a partial listing and a brief description of the myriad issues of fact and law which are interwoven in the framework of the CEA conspiracy against me, which have violated my Constitutional and basic rights as a citizen, deprived me of due process of law, caused great damage, and now threaten me with substantial irreparable harm if the Court does not intervene at this time. I hereby allege, based upon information and belief:

1) . . . that the issuance of the initial complaint by the CEA Docket No. 167 in February, 1970, retrospectively alleging underfinancing months after I had discontinued trading under CEA rules and had launched The American Board of Trade, was based on fictitious evidence deliberately manufactured by the defendants, in violation of my Constitutional rights.

2) . . . that the CEA has given the word "willfull," as used in Section 6(b) of the Commodity Exchange Act and also under Section 0.3(c) of the rules thereunder, a unique interpretation to meet the special conspiratorial requirements of CEA Docket No. 167, in violation of my Constitutional rights, as more fully set forth under Section "O" of this affidavit.

3) . . . that the CEA abrogated all semblance of due process under law in its conspiracy to railroad me and The American Board of Trade to our doom, as also set forth in detail in Section "O" of this affidavit.

4) . . . that I was deliberately held entrapped by the CEA under their Rule 1.17 from February, 1970, when I requested to be transferred from that Section to Section 1.31a, which does not have minimum financial capital requirements, through August, 1970, and that it required a petition to the Secretary of Agriculture to be relieved from the entrapment. This entrapment enabled the CEA to expand their initial complaint against me, even though I had not engaged in CEA-supervised activities since October 1969. This entrapment procedure was part of the CEA criminal conspiracy and a violation of my Constitutional rights.

5) . . . that the amended and expanded complaint issued in June, 1970, while I was being held in bondage by the CEA is an illegal instrument of law and violated my basic rights as a citizen.

6) . . . that the amended complaint contained figures from our financial records that had been *deliberately and surreptitiously altered and falsified* by a CEA auditor and had no relationship to our true financial standing, in violation of my basic rights.

7) . . . that the act of the CEA auditor in falsifying our financial records is a criminal act and a violation of my rights as a citizen.

8) . . . that the falsification of our records was knowingly confirmed and approved by higher officials of the CEA, a criminal act, in violation of my basic rights.

9) . . . that the discrediting, harmful and false figures, which were made an integral part of the amended complaint, were made available to the national press, credit agencies and interested persons, in violation of my basic rights.

10) . . . that the hearing conducted in August, 1970, at which I appeared pro se, was a sham and a farce, and a violation of my right to be heard and to defend myself against the conspiracy, as more fully set forth under Section "L" of this affidavit.

11) . . . that the referee, Jack W. Bain, conducted the hearing in a criminal and illegal manner in violation of my constitutional rights.

12) . . . that the so-called "referee's report" in CEA Docket No. 167, an actual photo-copy of the prosecution's brief, is a sham and a judicial fraud, and that the referee in presenting the photo-copies as "his" findings of fact, "his" conclusions and "his" recommendations—without mentioning our side of the story—is not only in violation of CEA procedural rules but also displayed judicial arrogance and misconduct as more fully set forth in Sections "M" and "N" of this affidavit, in serious violation of my rights as a citizen.

13) . . . that the CEA has falsified and fabricated numerous facts and figures in the record of CEA Docket No. 167 and that singly and collectively the falsifications, as more fully set forth and described in Section "Q" of this affidavit, are a violation of my rights as a citizen.

14) . . . that the monolithic structure of the CEA attack on me, as generally set forth under Section "E" of this affidavit, against which there can be no effective or meaningful method of defense, is a violation of my Constitutional rights.

15) . . . that the judicial officer's insistance that I now file briefs prior to the oral argument, in connection with our exceptions to the referee's report, rather than subsequent, or in addition, to oral argument, as provided by procedural rules of the CEA, is a violation of my basic rights.

16) . . . that although the defendants above named have purported to act in their capacities as officials and employees of the CEA and the U.S. Department of Agriculture relative to their respective acts in CEA Docket No. 167, said defendants are actually acting without authority of the law and in violation of the Constitution and Statutes of the United States, and their acts, singly and collectively, are disturbing examples of the power of the government being misused for selfish and personal reasons in pursuit of evil objectives.

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The Development of My Business Philosophy

I joined the Chicago Mercantile Exchange in 1956 and for a period of four years thereafter was active in the capacity of broker, soliciting and placing orders on the exchange for

eggs, potatoes, onions and other commodity futures contracts. During that same period, I also solicited and handled orders for wheat, rye, corn, oats, soybean oil and soybean meal futures contracts traded on the Chicago Board of Trade. Although I was not a member of the Chicago Board of Trade, I regularly received brokerage commissions for orders placed thereon, through reciprocal arrangements with other brokers who were members of the Chicago Board of Trade.

During this period of four years, I became, first, generally, then later, acutely, aware of the fact that the large majority of traders and investors in commodity futures markets lost money and in many instances lost quite heavily. I was not surprised therefore, that a comprehensive study conducted by a government agency revealed that approximately 90% of traders and investors in commodity futures had only financial loss to show for their efforts in commodity futures speculation.

In approximately 1960, I also became aware of what I considered an anomaly in the world of U. S. finance, business and commerce, in that the commodity exchanges in our country were looked upon and considered as time-honored, traditional, unchangeable "institutions," the functions of which were to a) provide marketplace facilities for commodities; b) establish or fix prices, or reference points for pricing; and c) provide hedging facilities and modiums for trade and commercial interests. In the implementation of these functions, however, severe social and economic dysfunctions became evident and manifest—yet such dysfunctions appeared to be taken for granted as a part of the modus operandi of these "institutions."

Specifically, these dysfunctions were: 1) Constantly distorted prices of the commodities involved, and capricious and unwarranted price moves; 2) heavy and continuing financial losses to the trading and investing public; 3) disservice to trade interests and groups; 4) disservice to the economic operational structure of our nation.

I respectfully submit to the Court that the foregoing analysis of basic dysfunctions of our commodity exchange system represents a point of view which is shared by many businessmen, trade groups and members of our Congress. In the early 1960's, for example, Congress passed a law actually prohibiting the trading in onion futures markets.

Since the early-1960's, bills have been regularly introduced in Congress, and a Congressional hearing has been held, to prohibit trading in potato futures markets. In recent years, trade group and investor dissatisfaction with the modus operandi and functions of egg and other markets have been publicized in the trade and financial press.

In 1960, I felt that I could no longer participate blindly as a broker in the servicing of customers within a system whereby the customers had such a slim chance of success. However, I did feel that I, personally, had achieved sufficient knowledge and expertise to successfully manage the trading accounts of other investors, rather than simply executing their orders on organized exchanges. It was in 1960 that I conceived and introduced the concept of the Economou Supervised Trading Programs wherein customers would join a specific trading program and authorize me to make and implement all trading decisions on their behalf.

It was in the early 1960's that I also conceived the need for an Association in the commodity trading field in order to encourage, aid and engage in education in our chosen area of activity and to disseminate information, knowledge, data and special studies to its members. This concept was actualized in 1965, with the formation and launching of The American Association of Commodity Traders, and its official publication, the "Commodity Journal" as more fully set forth, as background and supplemental material of interest to the Court, under Section "G"—"The AACT"—of this affidavit.

In my role as manager for the Economou Supervised Trading Program, I gradually came in contact with and aware of basic problems which derived from the dysfunctions of the present exchange system.

For example, I was subjected not only to unwarranted and capricious price moves in the various futures markets but also to a very special form of penalty or "tax" for the privilege of executing my clients' orders on an exchange. This penalty or "tax" on my clients was in the form of having to pay a higher imposed market price for any contracts that I desired to buy and having to accept a lower market price for any contracts that I desired to sell in a given market. This penalty was imposed upon my transactions by the floor traders operating in their traditional

role of "market makers" on the commodity exchanges. Specifically, the moment it became apparent that I was in the market to buy, say, 100 contracts of soybean meal for one of my trading programs, the price of soybean meal at that time automatically went up by about $20.00 per contract; conversely, the moment it seemed that I may have wanted to sell 100 contracts of soybean meal, the price that I received immediately was lowered by $20.00 per contract.

This type of penalty, or "tax," imposed upon the orders flowing into a market represents a form of covert income to the floor traders, over and above the brokerage commissions that are openly and legally charged for the transactions. In the soybean meal example mentioned in the preceding paragraph, the regular brokerage commission in the futures market was $30.00 per contract—representing cost of having an order bought-then-sold, or sold-short-then-bought. On my transactions, however, my customers were literally forced to pay $20.00 per contract more than the market when buying, and receiving $20.00 per contract less than the market when selling or liquidating the commitment —for a total of $40.00 per contract penalty, plus the regular $30.00 commission, for a total of $70.00 charges for a round-turn commission on a single contract.

Total cost to my clients on a 100 contract trading commitment, at the $70.00 per contract rate, would be $7,000, for the "privilege" of having our orders executed on the exchange. Generally, such a transaction may be completed on the floor of an exchange in less than an hour—and the cost of such a service, to my clients, would be $7,000 per hour.

Usually, each of my clients would participate in a Program with a 1- or 2-contract commitment, which would require a $500 or $1,000 margin deposit. The $70.00 per contract cost thus represented a 14% dilution of capital in just one single trading transaction. Small wonder, then, that 90% of the public loses money when participating in the trading activities of the "institutions" regulated and supervised by the CEA.

I protested this commonly-accepted but detrimental aspect of the present exchange system to Mr. Harper, regional administrator of the Chicago office of the CEA, Mr. McMinn, regional administrator of the New York office of the CEA

and to the national administrator of the CEA, but received no acknowledgment of my protests or indication of what consideration my protests received.

Such excessive covert costs involved in buying and selling on the traditional exchanges induced by the presence of traders roaming the floors for situations or opportunities for garnering income over and above their regular commissions were against public policy and that was one of the reasons that prompted my decision to resign from the Chicago Mercantile Exchange in 1964.

The even more substantive reason that prompted my resignation from the Chicago Mercantile Exchange in 1964, however, was the realization that the price moves and the price swings on traditional exchanges constantly represent distorted and artificial values of the commodities traded thereon, and that such distortions are induced by and a covert function of the floor-trading activities on the part of the members of the exchanges.

Such price distortions form the basis of a substantial area of profit opportunities for the member floor-traders and said profits are garnered from the unknowing and unsuspecting public, who are trapped into buying a commodity when price has been forced, by the floor traders, to a temporary artificial level above true value, or, conversely, selling a commodity when price has been driven temporarily to an artificial level below true value of the commodity.

Numerous market tactics, stratagems and practices are employed and permitted by the exchanges as a means of inducing temporary dislocations and distortions of values, in order to provide profit opportunities for the traders. Such tactics, stratagems and practices include market rumors, concerted buying and selling "drives," the "catching of stop loss orders," deliveries or non-deliveries against open commitments, which serve as means with which to induce temporary dislocations within the price structure of a commodity.

Such practices serve not only to distort day-to-day values in a market, but adversely influence the intermediate and long-term price structure of a commodity, to the detriment of trade groups and have an adverse effect on consumer prices and on the broader economic structure of our country. These views are shared currently by trade bodies and economists in the potato, egg and silver market fields, who have

publicly expressed such views and have sponsored State and Federal legislation to prohibit or revise various aspects of the present exchange system.

I respectfully call to the attention of the Court that the dysfunction of commodity exchanges, in the form of constantly distorted and artificial prices, is not characteristic of the securities exchanges of our country, which are registered and are operative under the Securities Act of 1934, in which the concept of a *specialist* is clearly spelled out and incorporated in the Act as an integral part of the price-making function of the securities exchanges.

The basic function of specialists in the securities traded on the exchanges is to provide a liquid, orderly market for securities, to prevent inordinate and harmful price fluctuations and distortions. Such functions are truly vital to the operative and conceptual structure of the securities exchanges and rigorously supervised by the U. S. Securities and Exchange Commission.

Yet, the Commodity Exchange Act makes no mention whatever of the specialists function on the commodity exchanges, provides no means of eliminating harmful distortions and fluctuations—in effect allowing the floor traders considerable freedom to force prices one way or the other, or to permit undue and uncontrolled price moves by simply remaining on the sidelines and not taking a position, when it is to their economic advantage to employ the stratagem of inaction.

In the years from 1960 through about 1967, I also became aware, through painful experience, of still another weakness within the structure of the traditional exchange system and that that weakness represented an additional dysfunction that was detrimental to the public interest. I am referring to the inefficiency of the bookkeeping and accounting systems, within both the traditional commodity and the securities exchange systems, wherein each member or member firm sets up and purports to implement an accounting system to service his or its clients.

Conceptually and operationally, each member or member firm now has an individual accounting system all of their very own. There are about 500 operational memberships on the Chicago Board of Trade, another 300 on the Chicago Mercantile Exchange, another 300 on the New York Mercantile Exchange, and about 500 on the New York Stock Ex-

change—to mention four of the nation's major exchanges. Within the structure of the total of about 1,600 bookkeeping and accounting systems within these four exchanges, servicing millions of customers, it is a proved certainty that bookkeeping and accounting errors of serious and damaging proportions will be commonplace, to the detriment of the investing public and the economy of our nation.

The dysfunctions of our exchange system as presently constituted, became painfully clear to our entire nation from 1968 onward and the problem still besets the financial community and is receiving close Congressional study and scrutiny.

It became apparent to me that certain basic dysfunctions were *inherent* in the present financial and commodity exchange systems, and that these dysfunctions and misalignments *were caused by or were a function of the traditional structure of the exchanges themselves,* rather than motivated by greed, or short-sightedness, or selfish intent on the part of the membership of the exchanges. From 1964 or 1965 onward, I became increasingly occupied with the study of exchange structures, their conceptual and operational aspects and features, with the view of possibly contributing remedial suggestions and ideas to the community. I soon found out, however, that the traditional financial and commodity marketplace communities are quite unresponsive to any suggestion for basic conceptual change and, as has now become apparent, the necessary changes will have to be implemented through eventual legislation and imposed upon a lethargic financial community.

With the assistance of associates who possessed backgrounds in the disciplines of economics, operations research, law and accounting, I conducted extensive and intensive analysis from 1966 through 1968 of the present financial and commodity exchanges with the view of creating and implementing a new exchange and marketplace complex that would incorporate concepts and operational features to remedy or eliminate the present dysfunctions and would contribute constructively, rather than detrimentally, to the economic system of the U. S. and to public welfare.

The analysis developed by my associates and myself in 1966/1968, showed that any new marketplace and exchange complex would require unique conceptual features and would differ substantially from the modus operandi of traditional exchanges. Otherwise, it would be impossible to neutralize and offset the many misalignments and shortcomings of the present system.

First and foremost among the conceptual and structural changes would be the need for a decentralized membership organization—decentralized geographically, State by State, along similar, but not congruous, lines as the banking system of our nation, which in turn is based on and within the Federal Reserve System, the central banking authority—in place of the traditional structure whereby the membership is a tight knot of giant brokerage houses all located within a stone's-throw of the exchange.

Secondly, the new exchange and marketplace would require both centralized and decentralized public financing. In other words, the central "mother" complex—the exchange and its operational affiliates—would and should be publicly financed, and the memberships' decentralized operational units, on a State by State basis, also would and should be publicly financed.

Thirdly, the bookkeeping and accounting systems and functions would and should be structured on a strictly centralized basis and performed by a corporate operational affiliate, publicly financed.

Fourthly, the specialist function would and should be structured into commodity trading on the new exchange, even though the specialist function is traditionally unknown on present commodity exchanges and is not even mentioned in the Commodity Exchange Act.

Fifthly, the specialist function on the exchange, traditionally performed by individual members of securities exchanges, would and should, instead, be performed by an operational corporate affiliate, publicly financed.

Lastly, trading on the floor of the exchange by members for their own account would and should be strictly prohibited.

The foregoing conclusions, based on the 1966/1968 analysis, served as a base on which to conceptualize, organize and launch The American Board of Trade, Inc., the new exchange and marketplace, in 1969, as more fully set forth, as background and supplemental information of interest to the Court, under Section "H"—"The ABT Complex"—of this affidavit.

Starting about 1967, I also realized that the formation of

a new exchange and marketplace, in the form and structure of The American Board of Trade, Inc. and its operational affiliates, would make substantial demands on my time, attention and energies. I realized that once I got underway with the active planning and organizing of the ABT complex that I would probably be unable to continue my activities as manager of The Economou Supervised Trading Programs.

It occurred to me that the hundreds of clients in the Programs could more readily and more constructively be handled if their activities were merged into a mutual fund concept, which would permit greater trading flexibility but the managing of which would not require as much of my time as the Supervised Trading Programs. In this manner, I could capitalize on my background of account management experience and also provide personal income for myself and generate income also for Arthur N. Economou & Co., Inc., who would act as broker for the mutual funds. During 1967, I had several talks with both the regional office of the CEA and of the U. S. Securities and Exchange Commission relative to the feasibility of organizing trading syndicates in the form of limited partnerships that could be registered and sold as a securities issue under the Securities Act of 1933. Both governmental agencies agreed to the feasibility of such a concept and structure.

In 1967, I commenced work on the organizing and filing under the Securities Act of 1933, two trading syndicates in the form of limited partnerships, as more fully detailed under Section "I"—"The Two Trading Syndicates"—of this affidavit.

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The AACT

The American Association of Commodity Traders, of which I am founder and president was organized in 1965 as a non-profit organization and over the past 6 years has attracted about 1,500 members, who pay dues of $12.00 a year and receive the bi-monthly "Commodity Journal" of which I am editor, with their membership.

The objectives and purposes of the AACT, as set forth in its By-Laws are as follows:

"To encourage, aid and engage in education and hold

courses of instruction in the fields of commodity trading and commodity futures markets . . . To engage in organized research for a better understanding of commodity futures markets . . . To study the various factors that influence commodity futures prices . . . To disseminate information, knowledge, data and special studies of value to members . . . To publish the results of pertinent and significant studies . . . To assist in the development of more adequate educational programs . . . To establish and maintain a commodity reference library and research center . . . To sponsor conferences, groups and meetings planned to implement the purposes of the Association."

The "Commodity Journal," official publication of the AACT, carries 3 or 4 full length feature articles in each issue, which are written by AACT members. These articles are of a technical or semi-technical nature. The authors usually possess a background not only of actual trading experience but also in one of the major disciplines, such as mathematics, operations research, accounting, etc.

From time to time meetings are held in the form of seminars or symposiums. Such meetings have been attended by from 20 to 50 members and guests and have been held in Chicago, New York, Baltimore, New Haven and Hartford, Conn., and Boston.

AACT maintains a book department featuring about 35 books devoted to various aspects of commodity trading and related subjects. The books are sold at regular publisher's list prices.

One of the outstanding educational aspects of AACT is that it overprints by 1,000 to 1,500 copies each of the issues of the "Commodity Journal," and publishes a catalog of the "Journals" that are available. Currently AACT has an inventory of about 20,000 Back Issues of the "Journal," which are sold to new members at $1.00 per copy, resulting in frequent orders for all of the 36 or 37 back issues still in print.

Editorial and administrative functions of the AACT are performed by Arthur N. Economou & Co., Inc., which since 1965 has enjoyed harmonious and constructive relationships with the AACT.

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The ABT Complex

The ABT exchange and marketplace complex comprises The American Board of Trade Inc., The American Board of Trade Service Corp., The American Board of Trade Clearing Corp. and The Journal of Investment Finance, Inc., all administered by The Economou Financial & Development Corp., of which I am the president and controlling stockholder.

The ABT complex commenced operations in November, 1969. Since then it has been active in operating a market for silver, silver futures, silver coins, silver coin futures, foreign exchange, in the sale of its own commercial paper as a means of short-term financing, and as an agent for its clients for U. S. Treasury bills. The ABT is particularly active in "spot" silver and silver coin transactions—those intended for actual delivery, rather than speculation—as it is the only exchange through which individual investors may purchase as little as a single bar of silver or bag of coins and have it delivered directly to their home-town bank.

The activities of the ABT to date are not subject to regulation by either the U. S. Securities and Exchange Commission or the CEA under the Securities and Exchange Act or the Commodity Exchange Act, respectively. In launching the ABT, I had envisioned and planned and indeed our Articles of Incorporation called for registering the ABT with both the U. S. Securities and Exchange Commission and the CEA, in order to expand our base of services to the investing public and to offer a much broader scope for our new exchange. However, the conspiracy of the CEA, whereby the CEA complaint was issued and related acts were implemented by the CEA, has effectively vitiated and completely blocked our attempt to register with the U. S. Securities and Exchange Commission and the CEA itself, as fully detailed in Section "Q" herein.

The ABT concept is built upon radically new and innovative conceptual, organizational and operational approaches, the objectives of which are to remove the stumbling blocks and dysfunctions so firmly entrenched in traditional exchange operation, as outlined under Section "F" in this affidavit, and to provide a trading arena that operates to the

benefit of the investing public, as well as that of brokers, dealers and members.

These unique concepts—which are: A) Decentralized membership structure, patterned along the general lines of the U. S. banking system; B) centralized bookkeeping and accounting; C) introduction of the specialist function in commodity trading; D) elimination of floor trading on the exchange by members—would serve to greatly reduce the need for the CEA's functions, and also greatly diminish its areas of authority, as envisioned by Congress when the Commodity Exchange Act was enacted, and were the motivating influence that generated the CEA conspiracy to eliminate the ABT from the exchange community before the fledgling exchange had an opportunity to develop operational muscle.

Set forth below is a description of the unique ABT conceptual and operational features, in order that the Court may fully understand their impact upon CEA officials and personnel:

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A) Decentralized Membership: The ABT is a membership organization of qualified, franchised dealer-brokers and agents. as well as individual traders and investors. This organizational structure provides for *a decentralized network of sales and distribution* personnel and agencies throughout the country, rather than a tight knot of giant brokerage houses all located within a stone's-throw of the exchange. Each ABT dealer-broker or agent operates within a defined geographical area.

Spreading the sales and distribution channels throughout the country also enables the ABT to serve all its clients more effectively by allowing for individual and geographical differences in investment goals and patterns. Each dealer-broker can serve the residents of his own area in an effective, personal manner rather than having his perception of his clients' needs confused by what divergent voices on Wall Street or in Chicago are saying.

Exchange and marketplace facilities for The American Board of Trade are provided by an affiliate, The American Board of Trade Service Corp., which plans major financing through the sale of appropriate stock issues to the public. This is the first time that an exchange has attempted to seek its financing directly from the public. The franchised dealer-broker members will also seek financing through the

sale of appropriate stock issues—with such stock issues confined to the specific State or region in which they operate.

The implementation of a decentralized membership on a regional franchise basis, coupled with the plan for both national equity financing for the central complex plus local or regional equity financing for the franchised dealer-broker memberships, would place the entire ABT complex directly under the regulatory wing of the U. S. Securities and Exchange Commission and the regulatory bodies of the States in which the ABT franchises were operational. Pragmatically, then, the ABT complex would function under the duality of Federal/State regulation and supervision which has proved so outstandingly successful in our decentralized banking system. Thus, once the ABT developed operational strength and scope, the need for CEA regulation and supervision would be eliminated and the CEA would be relegated to a role of an advisory body, if that.

B) *Centralized Bookkeeping and Accounting:* Centralized bookkeeping, accounting, and clearing facilities are provided by The American Board of Trade Clearing Corp., which will also be publicly financed. The ABT Clearing Corp., in itself, constitutes a radically new departure from traditional exchange housekeeping. Under the traditional system, bookkeeping, accounting, and clearing responsibilities have been divided among thousands of individuals and houses. But the recent condition of the backrooms of Wall Street illustrates that the majority are not able to cope with the problems this presents. Outmoded equipment and techniques, concepts and systems no longer adequate in today's world, make it almost impossible for business to be conducted in an orderly manner.

By putting all necessary bookkeeping, accounting, clearing records, equipment and personnel into a centralized system and organizing them all under a single uniform inclusive system, The ABT Clearing Corp. can provide an efficient, workable means of handling the vast amount of paperwork and record-keeping necessary to the operation of the exchange. Public funding of the Corporation will provide the capital necessary to purchase the computerized data-processing equipment, and to hire personnel qualified to operate these systems. Paperwork backlogs will be lifted off the backs of individual broker-dealers and agents, leaving them and their staffs free to serve the needs of their clients, rather than muddling through mounds of papers.

It is quite obvious that the ABT system providing for centralized bookkeeping and accounting facilities would completely eliminate the need for the extensive auditing and bookkeeping regulatory functions which the CEA traditionally performs relative to the thousands of decentralized systems now operational within the registrants under the Commodity Exchange Act. Their function in this capacity would be reduced to monitoring the accounting systems of a handful of exchanges.

C) *Introduction of the Specialist Function:* Among the nation's organized commodity exchanges, only The American Board of Trade has envisioned the crucial and vital need for and has taken the necessary steps to inaugurate the function of Specialist on its trading floor—a function that is essential to assure fiuid and orderly commodity markets and to avoid the unduly wide and capricious price swings which are characteristic of the traditional commodity exchange price-making system to the detriment of private traders and investors and trade interests in the nation's financial community.

It is significant that the Specialist is one of the cornerstones of all securities exchanges and that the function of the Specialist is clearly spelled out in the Securities Exchange Act of 1934 and the rules and regulations thereunder. However, the vital function of Specialist is not even mentioned in the Commodity Exchange Act, nor have commodity exchanges incorporated the concept in their operational procedures—until The American Board of Trade was established.

It is the position of The American Board of Trade that its customers must be protected and cushioned against the financially and psychologically injurious effects of sudden, unreasonable and unwarranted price fluctuations and that the wholesome contribution of the Specialist concept must form an integral and basic part of an exchange. It is also the position of the ABT that the Specialist function, in stabilizing and helping to provide orderly markets, cannot be properly performed by individuals or firm members of an exchange but requires the resources of a publicly-financed corporate body to perform the critical tasks and functions involved.

The function of the Specialist within the operational structure of the ABT exchange and market-place complex

has been assigned to and will be performed by the operational affiliate, The American Board of Trade Service Corp.

By introducing the specialist function on a commodity exchange, the ABT has focused sharply on one of the major dysfunctions of the present exchange system and upon the apparent unwillingness of the CEA to structure remedial rules and regulations to meet the basic requirements of the Commodity Exchange Act, which is specifically concerned with undue and unwarranted price moves which hinder interstate commerce and are detrimental to the public interest. Thus, the CEA myopically endeavored to eliminate the threat posed by the ABT, by conspiring to destroy it in its infant stage.

D) *Elimination of Floor Trading by Members:* The American Board of Trade prohibits trading by members on the floor of the exchange for their own account. This may perhaps be one of the most sensitive areas of innovative change for the ABT, but it is one of the most important. We believe that when exchange members trade on the floor of an exchange in large groups, it is impossible for them not to be influenced by market action, either favorable or adverse to their own positions, and there is no possible way to avoid unified trading activity which serves to distort prices, whether generated by crowd psychology or conscious planning. The temptation is literally irresistible, under favorable market conditions, to "push" the market in the desired direction by concerted trading action. By prohibiting floor trading on the ABT, members place their own and their customers' orders by phone and are unaffected by the traditional crowd psychology, thus the groundwork has been laid for an exchange in which price determinations will be based on true market conditions, rather than being subject to the wild and meaningless fluctuations that can and do occur on an uncontrolled trading floor. Such capricious fluctuations and erratic price swings often provide unrealistic, supported gains to a handful of controlling members, while severely damaging or even wiping out individual small traders.

Here, too, it is readily apparent that the ABT has focused on one of the glaring weaknesses of the traditional exchange system—the dysfunctions induced by the presence of floor traders—and that the elimination of floor traders even on a single exchange, such as the ABT, at the outset, could

attract widespread attention and adoption, thus causing further loss of power and authority to the officials and personnel of the CEA.

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The ABT will publish "The Journal of Investment Finance," a journal devoted to investment planning, methods and opportunities, beginning in the latter part of 1972. The Journal of Investment Finance, Inc., has already begun publication of two popular investment information services —"The Silver Market Letter" and "The Foreign Exchange Market Letter." The ABT is interested in and responsive to the events taking place around it in the financial world, and of which it is a part. Thus we feel it is only fitting that the ABT should be publisher of investment news and information services that touch the pulse of the investment scene, and keep investors, traders and speculators informed and up-to-date on developments both within and without the ABT.

Though other exchanges have published newsletters of one kind or another, no other exchange has ever attempted to publish a major journal that will both serve the needs of its members and clients, and also be a significant financial publication in its own right.

The entire American Board of Trade exchange complex and The Journal of Investment Finance, Inc., are managed by The Economou Financial & Development Corp., of which I am president and controlling stockholder.

The Economou Financial & Development, Inc. filed an issue of common stock, in the amount of $300,000.00 with the U. S. Securities and Exchange Commission in 1969, and the filing became effective on May 26, 1970.

Proceeds from the sale of the EF&D stock issue were for the sole purpose of supplying the "seed" capital required to launch the ABT complex. In its letter of comment concerning the EF&D filing, the U. S. Securities and Exchange Commission remarked that the magnitude and scope of the ABT exchange and marketplace complex would require substantial financing over and above the financing undertaken by the EF&D in its filing and requested that a statement to that effect be included in the offering circular relative to the initial stock offering.

The CEA zeroed into the picture with its amended and expanded complaint against me under CEA Docket No. 167

on June 22, 1970, just as we started to advertise the EF&D stock issue in the financial press and were mailing out the offering circular to prospective shareholders.

The amended complaint carrying the CEA falsified figures of our financial standing and a completely untrue and distorted picture of financial deterioration on the part of ANE & Co., Inc., was released to the financial press shortly after June 22, 1970, before we had the opportunity to file our answer. Thus, by coinciding the issuance of the amended complaint with the announcement of the EF&D stock issue, of which they were well aware, the CEA succeeded in demolishing my image and that of the ABT in the financial community and negating any possibility of success of the stock issue.

It follows, of course, that this, in turn, eliminated completely the major financing required to implement the announced objectives of the ABT. Thus the CEA has, so far, cleverly accomplished the stagnation of the new exchange, with what they hope to be the "death blow" impending, when the judicial officer pronounces his guilt verdict, with the new wave of attendant national publicity.

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The Two Trading Syndicates

As mentioned in the preceding section of this affidavit, the two trading syndicates, The Economou Precious Metals Futures Trading Syndicate and The Economou Grain Futures Trading Syndicate, structured in the form of limited partnerships and based on the mutual fund concept of a daily net asset valuation of each partnership "unit," were an outgrowth of my management experience with the Supervised Trading Programs.

During 1967 and early 1968, I worked with several of my associates in developing the operational and legal aspects of the Precious Metals Syndicate, which was the first of the two syndicates to be filed with the Securities and Exchange Commission for registration under the Securities Act of 1933. Registration took place in mid-1968 and was made effective by the SEC on March 20, 1969.

The birth of this new mutual fund in the commodity field, I respectfully point out to the Court, held promise of con-

structive contributions, to both the average investor and to me, personally, as general partner and manager of the fund, and to Arthur N. Economou & Co., Inc., as exclusive broker for the syndicate. Average investors would benefit, in that they could participate on a low-risk, low-leverage basis in the futures markets for silver, platinum and palladium, without fear of being "knocked-out" with losses in their investment accounts which so frequently occur when an average investor attempts to individually manage his own trading or allows a professional manager to manage the account on the investor's behalf.

The outstanding contributions that the Precious Metals Syndicate would make to my welfare in the commodity field were simple, basic and two-fold.

a) As manager I could directly employ my extensive background of account management and ask and receive a fair return on or compensation for the expertise that I had developed, in the form of a management fee totalling 8% annually of the average overall value of the Precious Metals Syndicate. This source of income would be of critical necessity to me during the two years that I estimated would be needed to launch the ABT complex, with equity financing as a base source of funds;

b) Under arrangement with the Precious Metals Syndicate, Arthur N. Economou & Co., Inc. would act as exclusive broker for the limited partnership and this agreement would thus provide my company with an urgently needed source of income in the form of commissions derived from the brokerage that would be generated by the Precious Metals Syndicate regular trading and investment commitments in silver, platinum and palladium markets. Moreover, this arrangement for additional indirect compensation for me, as managing partner, was clearly spelled out in the Prospectus which was made effective by the Securities and Exchange Commission on March 20, 1969.

With the Precious Metals Syndicate filing effective on March 20, 1969, the stage appeared set for me to gradually phase out of the Supervised Trading Programs, finalize plans for the stock issue of the EF&D, which would seek $300,000.00 from the public as "seed money" to launch the initial development stages of the ABT complex, and to actively advertise, promote and start trading and investing in the Precious Metals Syndicate.

One of the stipulations of my agreement with the Precious Metals Syndicate, as its general managing partner, was that I would not start trading for at least 90 days after the issue became effective and we were permitted to offer the limited partnership units to the public. This lag I felt, would enable me to implement a constructive withdrawal plan from my previous activities and would permit a gradual phasing-in into the new conceptual and operational aspects of handling a mutual fund that allowed for a central activity pattern of trading, rather than the individualized handling of each managed account, as had been an explicit aspect of the Supervised Trading Programs.

For such reasons I "made haste very slowly" with the Precious Metals Syndicate promotions and trading, being aware that any mishap or trading mistake at the initial stages would most critically effect the sale of the stock issue.

By July, 1969, I had completed my final new trade in our Supervised Trading Programs and by October, 1969, had closed out all trading positions for our clients in the Programs. During this same period, I very cautiously implemented my initial minor trades for the Precious Metals Syndicate. None of the markets in which the Precious Metals Syndicate trades—silver, platinum, palladium—is subject to Federal or CEA regulations.

In October and November 1969, the ABT complex was launched operationally, and, gradually, my plans for promoting, advertising, developing and trading in the Precious Metals Syndicate gathered momentum and scope.

However, in February, 1970 we were notified of the CEA's initial complaint against us, and this served as an effective damper on my plans for the promotion of the Precious Metals Syndicate.

The stunning blow, however, occurred in June, 1970, when we received the amended and expanded CEA complaint, which contained figures from our financial records *that had been deliberately and surreptitiously falsified by a CEA auditor and had no relationship to our true financial standing.* As a matter of fact, the falsified figures in the expanded complaint showed a *totally untrue picture of our financial deterioration at the rate of $4,000.00 per month.*

In June, 1970, if I may point out to the Court, confidence in Wall Street firms was at an extremely low ebb. Brokerage firms had been failing, "backroom" confusions involving

customers' funds running into the millions were commonplace. The zeitgeist of the day was not conducive, to say the least, to investments offered to the public by a firm acting as broker and in a fiduciary capacity, when that firm was represented as suffering financial deterioration at the rate of $4,000.00 per month. The CEA made these falsified figures available to the press and the press carried the "story" nationally, promptly upon release of the amended complaint.

I soon became aware of the stunning impact that the CEA's "story" had upon the prospects and affairs of the Precious Metals Syndicate. Partnership redemptions were requested and many prospective partners informed me that "as soon as you get your legal problems settled with the Government, we will be glad to 'take another look at the Syndicate.'"

Nor could I easily convey my own side of the story of this disgraceful episode in the history of the administrative agencies of our country. I found when I attempted to reveal the true story of the CEA's criminal conspiracy against me, that people—friends and business acquaintances alike—quickly started to show embarrassment over a situation whereby they are asked to attempt to judge the validity of such an unthinkable charge. Such is the power of an agency to demolish a citizen's reputation by simply pointing a finger and stating "facts" and "conclusions" that were a sheer fabrication calculated to bludgeon Arthur N. Economou before he had an opportunity to upset the staid, rusty and detrimental concepts that were voted into our financial community 35 years ago.

Thus the Precious Metals Syndicate has come to a sad and abrupt halt in its development. No partnership units have been sold now for quite some time. I cannot undertake to try to explain "my trouble with the CEA" to prospective partners I am conditioned now to their embarrassment and their silences and I cannot go ahead with the Syndicate until I receive relief from the Court in the form of a temporary injunction, initially, and a permanent injunction, subsequently.

The Economou Grain Futures Trading Syndicate was organized as a New York State limited partnership in 1969 along the same conceptual and organizational lines as The Precious Metals Syndicate. Its objectives were to trade and invest in futures contracts of major grains—corn, wheat,

rye, oats—which are handled on a number of the nation's commodity exchanges registered under the Commodity Exchange Act, and are subject to regulation by the CEA.

The Grain Futures Syndicate's registration statement, encompassing 5,000 limited partnership units to be offered to the public at an initial price of $500.00 per partnership, for a total offering of $2,500,000, was filed with the U. S. Securities and Exchange Commission on September 30, 1969. At that point, my associates and I had worked for about two-and-a-half years to organize, develop and formulate the legal and operational structure of the two Syndicates in order to qualify the limited partnership units for registration with the U. S. Securities and Exchange Commission and to be in a position to be able to offer the partnership units, under the provisions of an effective registration statement, for sale to the public.

As with the Precious Metals Syndicate, I am the general and managing partner of the Grain Futures Syndicate, with a contractual arrangement whereby I receive a management fee of 8% annually of the overall average net asset value of the syndicate. In addition, ANE & Co. has also entered into an agreement to act as broker for the Grain Futures Syndicate in placing orders for execution on various grain exchanges. ANE & Co. has made further arrangements with other brokers in order to be compensated in form of a portion of the commisions generated by the Grain Futures Syndicate trading activities. This arrangement was similar to ANE & Co.'s brokerage arrangement with the Precious Metals Syndicate. Such brokerage, of course, was intended to provide still another source of badly needed income during the 1969-1971 transition period, as I phased out of my previous activities with the Supervised Trading Programs and into the activity of launching the ABT complex and managing the two Trading Syndicates.

In mid-March, 1970, we received the letter of comment from the U. S. Securities and Exchange Commission relative to the registration statement filing of the Grain Futures Trading Syndicate. Though the Precious Metals Syndicate partnership units had been cleared for sale to the public a year earlier, and the Grain Futures Syndicate was similar to that filing, the March, 1970, letter of comment outlined numerous changes that would be needed in the registration statement and the prospectus itself before the Grain Futures Syndicate could be declared effective by the SEC.

By mid-March, 1970, the U. S. Securities and Exchange Commission knew that the CEA had instituted its CEA Docket No. 167 against me and ANE & Co., and one of the requirements outlined in their letter of comment was that it would be necessary for me to include a statement in the Grain Futures Syndicate as to whether I had been subject to or involved in any proceeding by any regulatory or supervisory agency. This was the first time that the SEC had ever requested that we include such information, and I felt that it would seriously affect the sale of the partnership units. Nevertheless, the CEA had apparently made no general press release of the CEA initial complaint issued in February, 1970, and I felt that, since the CEA was at fault and that the complaint no doubt would be withdrawn in short order, that we should immediately proceed to implement the numerous changes that were required by the SEC letter of comment.

My associates and I worked diligently to structure and re-model the registration statement and the prospectus, as required by the SEC, and the work was almost completed, when we were bludgeoned unexpectedly by the expanded and amended CEA complaint in June, 1970. Then and there, our work stopped on the Grain Futures Syndicate, for the immediate public reaction to the CEA falsified amended complaint, showing that ANE & Co.'s financial position was eroding at the rate of $4,000.00 per month during the first quarter of 1970, was extremely negative, thus precluding any possibility of success with our planned offering of a total of $2,500,000 in partnership units for sale to the public.

As a denouement, we have just received word from the Washington office of the U. S. Securities and Exchange Commission relative to the status of our registration statement of the Grain Futures Syndicate, filed September 30, 1969. It has been declared "abandoned" by the SEC, for lack of follow-through action on my part.

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"ANE & Co., Inc."

Arthur N. Economou & Co., Inc., of which I am the majority and controlling stockholder, is a Delaware Corporation and from 1960 through October, 1969 acted as broker for the Supervised Trading Programs. Together with my-

self it is a respondent named in the complaint and amended complaint issued in CEA Docket No. 167.

In addition to its brokerage activities, ANE & Co., Inc. also regularly published commodity market letters from approximately 1955 through to 1969. During the period 1965 through to the present, the company has provided office facilities, personnel, management and editorial services for The American Association of Commodity Traders.

Since the Supervised Trading Programs were discontinued in October, 1969, the company has employed its personnel, management and editorial services on behalf of The American Board of Trade, through The Economou Financial & Development Corp.

Brokerage derived from the trading activities of the Supervised Trading Programs provided the main source of revenue for ANE & Co., Inc. from 1960 through July, 1969. when the last commissionable trades were implemented for Supervised Trading Program clients.

In general, gross commissions which ANE & Co., Inc. derived from Program trading activity in both regulated and non-regulated accounts *per month* amounted from $6,000.00 to $12,000.00—which represented ANE & Co., Inc.'s share of the commission charged to customers, the other portion of the gross commission accruing to a clearing house member of one or more of the exchanges.

This $6,000.00 to $12,000.00 per month gross income from Program trading shriveled to zero starting August, 1969 when I discontinued the Programs. I was not concerned, however, for with the reputation I had established over the preceding 14 years, I know that I could quickly build up our income from the Precious Metals Syndicate and the Grain Futures Syndicate to the same level and even, in fact, far in excess of what I had accomplished in my peak periods previously.

However, such has not been the case. The Precious Metals Fund is dormant, with only moderate brokerage commissions accruing. On the other hand, the Grain Futures Syndicate never got off the ground. The framework is there, but its potential lies deeply asleep as long as the CEA is permitted to perpetuate criminal acts upon an innocent citizen and one of his companies.

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Sequence of Events and Acts

Early in 1969, the CEA announced that the Commodity Exchange Act and the rules thereunder had been amended to provide for minimum financial requirements for commission merchants registered under the Act who carried the accounts of their customers on their own books. The applicable requirements for minimum financial requirements were set forth generally under Section 1.17 of the rules. On the other hand, if a commission merchant did not wish to carry the customers' accounts on his books—or if he could not meet the financial requirements under Section 1.17—he could function as a commission merchant under Section 1.31a, which had no minimum financial requirements. However, under Section 1.31a, his accounts would have to be transferred to and the bookkeeping and accounting for the customers handled by another commission merchant who qualified under Section 1.17 or was a member of a commodity exchange registered under the Commodity Exchange Act.

The rules and regulations under Section 1.17 are vague, abstruse and subject to diverse interpretations. In simple language, we just did not understand what the rules meant.

In February, 1969, I visited the New York regional office of the CEA to secure assistance in the interpretation of and clarification on the various sub-sections and sub-sub-sections of Section 1.17. Notwithstanding our general knowledgeability and background in matters of accounting, my associates, including a C.P.A., and myself, simply could not understand the various nuances of Section 1.17. Unfortunately, the problems of explaining or interpreting the vaguely and ambiguously written regulations were far too great for any part or all of the accounting staff of the CEA New York regional office, or, at least, they gave us to understand that they did not have the authority to make definitive interpretations of the new regulations. One by one, each of our questions was referred to Washington headquarters of the CEA, either on the spot by telephone or a promise made to let us know the answers "just as soon as we hear from Washington." Therefore, we left our "clarification" visit with the New York office little wiser than we had arrived.

The new rules under Section 1.17 were to become effective as of March 31, 1969, at which time commission merchants

were to file financial statements. In February and March there were numerous phone calls between the CEA New York staff and myself concerning the meaning of the various sub-sections under Section 1.17. At one specific time during these discussions, it was not clear in my mind whether we needed $10,000.00, the minimum financial requirement, or $100,000.00—*it all depended upon how some of the sub-sections of Section 1.17 were interpreted.* Very little help, however, was forthcoming from the CEA New York regional office to provide the concrete guidance we needed in order to correctly interpret Section 1.17 for the purpose of meeting the requirements.

By mid-March, 1969, with the deadline for our first statement filing approaching, it was necessary to "go it on our own"—to structure the various agreements and accounts on our books to meet with the requirements of the newly and amorphously written Section 1.17. It was my decision at that time to rely on our legal associates and our C.P.A. for meaningful interpretation of the various items and sub-sections of Section 1.17.

The New York office of the CEA was so advised. At that time, I was also careful to point out that we were eager to have final interpretative guidance and decisions from Washington and asked that they please let us know as soon as word had been received.

Our initial financial statement as of March 31, 1969, was prepared to the best of our ability and understanding and filed with the CEA. However, we informed the CEA that should any of the assets, or their documentation, which we had prepared to the best of our ability and understanding to meet the requirements of the new rules, be questioned, that ample constructive alternatives were available. I pointed out that naturally I did not wish to divert capital from the new enterprises that I was undertaking at that time and tie up the capital in an area which was being discontinued, but I explained that I would be willing to advance the cash, if necessary, rather than get involved in endless wrangles and haggles concerning the meanings of the various sub-sections of Section 1.17. One key asset on the books of ANE & Co., in the form of $9,000.00 owed to us by the American Association of Commodity Traders, secured by a substantial inventory of readily saleable back issues of the

"Commodity Journal," I offered to pay off personally, if it were questioned.

In addition, one other logical alternative would have solved the entire situation in one relatively simple step—for, since I had made the basic decision early in 1969 to phase out of the account management business, in the form of the Supervised Trading Programs, in order to concentrate on the development of The American Board of Trade, we could readily re-classify from Section 1.17 of the rules into Section 1.31a, which requires no minimum financial capital for an organization which does not carry the accounts of customers on its own books. This fact was also discussed with the CEA auditors as well as the New York regional administrator of the CEA.

In April, 1969, shortly after we had filed our first financial statement as of March 31, 1969, I also requested assistance and guidelines from the CEA with reference to the concepts and operational structure of the new ABT exchange complex. I first approached Mr. McMinn, regional administrator of the New York CEA office, and explained the general structure and expressed the desire to secure the views and suggestions of the CEA to serve as guidelines for the ABT's eventual registration under the Commodity Exchange Act. I explained the various new concepts that were involved in the ABT organizational structure and operational scope. Mr. McMinn offered no practical views or opinions, other than to suggest that I contact Mr. Robinson, director of compliance of the CEA Washington office.

I followed through on Mr. McMinn's suggestion and phoned Mr. Robinson in Washington. I went into considerable detail regarding my plans for the launching of the ABT exchange complex. However, Mr. Robinson represented a virtual wall of resistance, in that he made no suggestions whatsoever as to the procedures that could best be followed in organizing the ABT into final form to qualify for registration under the Commodity Exchange Act, and manifested overt hostility throughout the conversation.

I had no idea at the time that April, 1969, represented the specific juncture in time during which the decision was reached by CEA high officials—specifically, Caldwell, national administrator; McMinn, New York regional administrator, and Robinson, national compliance director—to im-

plement a conspiratorial plan of action to discredit me publicly and through such discrediting to deal the fledgling ABT complex, which was to be nurtured financially in its initial developmental stages by the sale of stock issues to the public, a mortal blow. As a "bonus" to the conspirators, the plan had additional values— a) I, too, would be effectively eliminated from the financial scene and my criticisms and protests of the basic dysfunctions of the exchange system would no longer serve to irritate the CEA hierarchy; b) my reputation and status as founder and president of The American Association of Commodity Traders would be discredited; and c) the Precious Metals Syndicate, launched just a few weeks previous, would be completely vitiated.

Based upon an inductive analysis of the various acts of the CEA and the sequence of events in CEA Docket No. 167, upon testimony given at the hearing, upon documents from the files of the CEA supplied to me upon request by the CEA, upon documentary evidence that has come into my possession over the past 23 months—I am prepared to prove beyond any reasonable doubt that the conspiracy grew "like Topsy," and eventually also encompassed and involved the office of the Secretary of Agriculture, an Assistant Secretary of Agriculture, a deputy director of the CEA, an attorney and a chief hearing examiner of the U. S. Department of Agriculture and three CEA auditors, in addition to the three originators of the conspiracy mentioned supra. The auditors were the "hatchet men" in the conspiracy, for their job was to plant and nurture the fabricated evidence against me or establish a "launching pad," which would be used in the conspiratorial monolithic assault that was carried on undercover from April through February, 1970, when the initial complaint was filed against me—and both covertly and overtly from February, 1970, through to the present time.

In a so-called "audit" of our books and records in April and May of 1969, following the filing of our initial financial statements, as of March 31, 1969, it is now apparent that the practical aspect of the conspiracy got underway and was implemented by Edward Fitzpatrick, CEA auditor. In the years we had been registered with the CEA, our books invariably were audited by CEA auditors working in teams of two men, with both men working together closely on a single, unified audit. After each audit, invariably and without exception, the two men would have an overview report for us in what was termed a post-audit interview, during which the findings of the auditors would be related to us verbally and suggestions offered for corrections of any discrepancies or errors on our books.

The CEA conspiracy, however, required a divergence from this established pattern. Though Mr. Fitzpatrick was accompanied by another CEA auditor, Mr. Jackson, who is not named in the instant action, the two auditors worked in two distinct areas of our accounting system and these two areas did not overlap. Specifically, Mr. Jackson occupied himself with a complete audit of the individual customer's accounts which we maintained on our books in our 5th floor quarters, while Mr. Fitzpatrick occupied himself primarily with the financial records of ANE & Co., in our 11th floor offices. Fitzpatrick also spent part of his time on the 5th floor working on a reconciliation of our customers' market positions as recorded on our books with those reported by our clearing house associates.

Subsequently, in July, 1969, Mr. Jackson visited me for a post-audit meeting with reference to the audit of the individual customers' accounts. *Significantly, Fitzpatrick did not visit me for a post-audit meeting with reference to his audit of the general financial standing of ANE & Co., as of March 31, 1969.*

It was during the April/May, 1969, "audit" conducted by Fitzpatrick, that the groundwork was laid by the CEA for the manufactured charges that we were "underfinanced," which formed the base for the complaint issued in February, 1970.

During this "audit," as I testified at the hearing, both I and Mrs. Economou, who is an officer in ANE & Co., Inc., found Fitzpatrick extraordinarily difficult to talk with and extremely rude and overbearing in his attitude toward me and Mrs. Economou. His rude and insulting attitude was consistent throughout a variety of meetings with Mrs. Economou and myself separately, as I maintain my office on the 11th floor and Mrs. Economou is located on the 5th floor. This was completely at variance with our past experience of unfailing and unvarying courtesy on the part of all CEA auditors with whom we had come in contact over the years.

We did not know then, of course, that Fitzpatrick was

setting in motion the initial but vital step in the subsequent allegations and complaint that our assets did not meet the requirements of the new Section 1.17. Every document that I showed him met with disapproval and was brusquely and rudely declared unsatisfactory; every suggestion that I offered as an alternative was similarly treated with disdain and ridicule. At the same time, it was apparent to me that Fitzpatrick's meager background in accounting and complete lack of background in law completely disqualified him as an intelligent judge of proper legal documentation and many of his comments were totally inappropriate and invalid.

I hereby state and allege that Edward Fitzpatrick was sent in by the CEA to conduct the aforementioned "audit" for the specific purpose of "discovering" that the assets were not documented in a manner as to meet the requirements of Section 1.17. I hereby state that the "invalidity" of said documentation was not based on fact but on a predetermined plan to disallow our assets on the basis of the so-called Fitzpatrick "audit," regardless of the basic truth.

Fitzpatrick's manner and method of conducting the "audit" was so overbearing and obnoxious that in one instance I telephoned the CEA New York Regional Administrator to complain of his conduct; in another instance, I was so upset that I ordered him out of my office. As I mentioned previously, this was a most extraordinary departure from the polite and pleasant attitude of CEA auditors that we had encountered over the years and had come to consider CEA "policy."

At this point in this Section of this affidavit, I respectfully call to the attention of the Court several pertinent aspects of the so-called "audit" which was conducted by Fitzpatrick, as follows:

1) The CEA has not alleged at any time that the assets on our books did not exist. Such assets were later disallowed in the complaint because they were allegedly not properly documented or did not meet the requirements of the amorphous Section 1.17 of the new rules, based on what Mr. Fitzpatrick "found" in his audit and based on how he chose to interpret the various sub-sections of Sec. 1.17.

2) That in view of the controversy arising from Fitzpatrick's inexpert appraisal and evaluation of the validity of our documentation and his outrageously rude manner of

conveying his opinions, this grotesque confrontation ended on the note that the entire matter would be referred to Washington for decision and that we would be told if either the assets or documentation thereof were not acceptable. As we heard nothing further, we rightfully assumed that it had been decided by Fitzpatrick's superiors that all was in order and we proceeded on that assumption.

3) Subsequent to the Fitzpatrick "audit," the CEA alleges, a "determination" was made that the assets in question did not meet the requirements of Section 1.17. However, we were not told about either the "determination" made by the CEA, or Mr. Fitzpatrick's "findings" upon which the "determination" was based, until the complaint was issued in February, 1970.

As set forth above, at the time of the Fitzpatrick "audit" I was not told that the assets were invalid; it was only a question primarily of whether the assets were properly documented. In view of the conspiratorial nature of the Fitzpatrick "audit" in April/May of 1969, it is now clear that his part in the conspiracy was to assert that the documentation of the assets, "in his opinion" did not meet the requirements of Section 1.17. I hereby state that irrespective of what I showed him or could have shown him, the documentation would still not "meet the requirements of Sec. 1.17." Thus the groundwork was cleverly laid for the later surreptitious disallowing of assets based on "improper documentation."

The fact that I repeatedly told Mr. Fitzpatrick during his April/May, 1969 "audit" that there need be no concern on anyone's part if the assets did not qualify, for there were several constructive alternative procedures—such as my paying off the AACT indebtedness to our company, or simply reclassifying into Section 1.31a which has no financial requirements, in view of the fact that I was phasing completely out of the business of individual account management—was entirely disregarded by the CEA.

During those many unpleasant wrangles with Fitzpatrick, I repeatedly stated, "For heaven's sake, just tell me what you want me to do and I'll do it!" However, such pleas on my part were disregarded by both Fitzpatrick and the CEA hierarchy, all of whom gave the vapid impression that they had no idea what I should do in order to be assured of acceptably meeting the requirements of the new rules.

This vagueness is now, in retrospect, completely understandable because, if the conspiracy were to succeed, it was essential that I be prevented from following any course of procedure that would serve to extricate me from the tightening jaws of the trap that the CEA was closing around me and the organizations I had created.

To add to the effectiveness of the trap, a seemingly innocuous ploy was implemented—in the form of an omission. Specifically, Fitzpatrick *omitted his post-audit report to or meeting with me.* As mentioned previously, Mr. Jackson called on me and, as he testified at the hearing, presented his post-audit report to me in about July, 1969, relative to the individual customers' accounts on our books.

Fitzpatrick, however, had obviously been instructed not to afford me the customary post-audit report or meeting, as I certainly would have pressed for the answers to the various questions which had been "referred to Washington."

Thus the initial stages of the conspiratorial CEA acts were set up—for the purpose of publicly discrediting me and my affiliated organizations. Specifically, on the one hand, Fitzpatrick had laid the groundwork for saying, whenever he was called upon subsequently to do so, that what he "found" in his audit did not meet the requirements of Section 1.17, and on the other hand, I was effectively blocked from supplying any easily-applied remedial measure by being trapped, in the absence of any notice, warning, or post-audit meeting, into believing that the CEA found our assets and the documentation of the assets perfectly satisfactory.

In July of 1969, I made the last new trade for our customers in our Supervised Trading Programs. I have made no new trades for customers since then in the Programs, nor have I derived any commission income from such customers since July of 1969. We subsequently began a systematic course of auditing and verifying each of the hundreds of accounts and refunding all credit balances. This was completed and all customers' accounts refunded and closed by April 24, 1970.

Through February, 1970, when the CEA issued its first version of its complaint against us, we heard nothing whatsoever from them concerning either our financial statement or what decisions pertaining to it had been made. Meantime, we submitted our financial report as of June 30, 1969 and

prepared our December 31, 1969 report for submission to the CEA—completely and utterly oblivious of the fact that the CEA officials and personnel had made the decision to "get Economou," and were to implement the decision in the form of an organized conspiracy.

In November of 1969, the ABT complex became operational in a modest fashion, and the CEA at that time requested that we supply them, for their general information, all printed material and data pertaining to the ABT. This material was promptly supplied, in duplicate, to the New York office of the CEA, attention of Mr. Coopersmith, assistant regional director.

Unknown to us, however, the CEA conspiracy at that time had extended to a surreptitious defamation and discrediting campaign against me directed to the attention of the U. S. Securities and Exchange Commission. I hereby allege, based on knowledge and belief and upon documentary evidence that has come into my possession, that the CEA, in late 1969 and early 1970, conveyed distorted, fabricated and completely misleading information to the SEC for the specific purpose of convincing the SEC that the Precious Metals Syndicate was an illegal enterprise and that, furthermore, the CEA made deliberate efforts to induce the SEC to undertake injunctive proceedings against the Precious Metals Syndicate. The paradox and the anomaly here is that the SEC had made the Precious Metals Syndicate registration effective as of March, 1969—only to find itself influenced by its junior counterpart in Washington to initiate injunctive proceedings against an Economou innovative concept that both the SEC and the CEA had conceptually approved in 1967 and 1968. I hereby state that the warped misinformation supplied by the CEA to the SEC relative to the Precious Metals Syndicate in November, 1969 through January, 1970 is not only a violation of my rights as a citizen, but indicative of the criminal nature of the CEA conspiracy against me.

As already mentioned, we were served with the initial complaint in February, 1970, in which the CEA alleged that we had violated the Act and Section 1.17 of the regulations. Specifically, the CEA had disallowed current assets as listed in our financial reports submitted as of March 31, 1969 and June 30, 1969, in the total amount of approximately $18,000 and $19,000, for the two dates, respectively, and charged

that we lacked $6,000 as of March 31, 1969 and $700 as of June 30, 1969, of having enough funds to meet minimum financial requirements, after said disallowance of assets.

Meantime, throughout the entire period through February, 1970, we had never been advised that these substantial items did not, in the opinion of the CEA, qualify as current assets, not to mention being advised that we would be in "willfull" violation of the Commodity Exchange Act and the CEA regulations if we listed them as current assets.

I acted promptly on receiving the initial February complaint—which I then believed to be based on simple misunderstanding. *First, I asked for instructions from the New York CEA regional office on how to proceed in reclassifying from Section 1.17 into Section 1.31a,* which requires no minimum financial requirements, inasmuch as the rules and regulations of the CEA *nowhere spelled out this basic reclassification procedure.* Next, I pointed out that, as the CEA knew, the last new trade for customers had been put on as of July, 1969, and that all customers' margin balances were being systematically refunded in this phasing out process. I then requested a meeting with the national CEA administrator in Washington for the purpose of bringing all the facts to his attention.

At the Washington meeting, which was held April 1, 1970, I mentioned to the national CEA administrator that I had asked the New York CEA office for instructions in reclassifying into 1.31a, inasmuch as we had closed out all remaining market positions for customers in October, 1969, and were in the process of gradually phasing out of the managed commodity account busir s by refunding all margin balances.

At that same Washington meeting, in which five CEA officials and the national CEA administrator participated, I briefly reviewed the activities of The American Board of Trade, and I told the meeting that, as they knew, we planned to eventually apply for registration as an exchange under the Commodity Exchange Act, and that I felt, sincerely, that this was one organization that could lead the way to solving some of the problems of misalignments and dysfunctions that traditionally beset the commodity field.

I was shocked and stunned at that same meeting to hear The American Board of Trade referred to as a "bucket shop" several times by Mr. Robinson, CEA compliance

director, and by the CEA national administrator. To me, this was a shocking revelation, for the CEA had been supplied full data pertaining to the ABT and its operational concepts had been explained in detail to McMinn and Robinson as early as April, 1969. Its concepts, to be sure, were unique, innovative and perhaps somewhat radical to the traditional-minded CEA, but the ABT's operational plans and objectives, as fully explained in our literature, as well as the unusually high proportion of actual deliveries being made against ABT customers' market positions, when compared to other exchanges, were in such direct contradiction to any possible definition of a "bucket shop" that I was completely taken aback and at a loss to understand the slur.

I hereby allege that by referring to the ABT as a "bucket shop" in front of five CEA officials, the "undercover" phase of the anti-ABT campaign was being implemented, for this poison was intended to and would inevitably "leak"—and it did succeed in reaching various segments of the financial community. Specifically, administrative personnel of the New York Stock Exchange, who had evinced interest in buying memberships on the ABT, were told by a member of one of the major commodity exchanges that the ABT was an organized "bucket shop"; and also, a member of the Winnipeg Grain Exchange was told by one of his customers that he, the customer, had heard that the ABT was a "bucket shop."

I hereby state that the continuous reference by CEA officials to the ABT as a "bucket shop" in group meetings that were held in the national administrator's office in April, 1970, in July, 1970, with eight or ten present, and a smaller meeting in December, 1970, represented one of the insidious devices employed by the CEA hierarchy to discredit a new and innovative exchange complex, and in employing such pernicious methods of defamation, the CEA officials have acted in a criminal manner.

Around the first week in April, 1970, we heard from the CEA regional office with regard to the procedure required to reclassify into 1.31a. All we had to do, they said, was simply refund any credit balances and close out our customers' accounts. This we did, with all regulated accounts cleared from our books by April 24, 1970.

My associates and I worked diligently to structure a comprehensive Answer to the complaint, and this was filed with

the CEA as of April 24, 1970. In our Answer, we requested a Hearing in order to show conclusively why the complaint should be dismissed.

Our request for a Hearing to this initial complaint was not granted, nor was any further reference made to the request in our subsequent contacts with the CEA.

I had hoped, meantime, that the strength of our Answer had induced a change of plans on the part of the CEA, and that finally they had switched to a proper overall perspective of what was involved. My hopes, however, were in vain. I did not realize at the time that I had been enmeshed within a CEA onslaught and conspiracy and that it would require practically super-human stamina and energy to withstand it and survive.

Apparently, what the Answer had actually induced was a realization that the CEA needed a much stronger case, reinforced with additional "evidence" of "willfull" violation of the Commodity Exchange Act and the regulations of the CEA, combined, where possible, with the power of selective release of information to the public and interested individuals. It must have been disappointing to the CEA that the original complaint received no mention in the financial press and some new angle was needed which would be irresistible bait for the press. Meanwhile, they obviously became aware that the SEC intended to approve our stock offering for the purpose of obtaining "seed money" for the ABT complex.

In furtherance and reinforcement of their evil objectives, the CEA now swung into sustained activity. We were subject to a new audit, ostensibly for the purpose of clearing the deck for reclassification from Section 1.17 into Section 1.31a, which we had long pleaded for. I should like to mention at this point the important fact that nowhere in the rules and regulations of the CEA is there a procedure outlined that points out the steps that need to be taken, should a registrant desire to reclassify from Section 1.17 to 1.31a, or vice versa.

The new audit which took place early in April and was completed by mid-April also represented a deviation from the norm. As mentioned earlier, all previous audits had been conducted by a two-man team. However, this new audit was undertaken by a Mr. Chadonic, a then CEA auditor, who is not named as a defendant in the instant action. The

unusual aspect of Mr. Chadonic's audit was not only that he was by himself but also the obvious eagerness which he manifested in attempting to construe a misplaced figure in our books, for example, as a "violation of the rules."

One occasion in particular stands out in Mrs. Economou's memory. She and Mr. Chadonic were searching for a discrepancy on our daily segregation sheet and discovered that on a particular day a figure had been posted in the wrong column. On the very face of it, replacement of this figure in the proper column did not alter the fact that we were amply oversegregated on that day, yet Mr. Chadonic was obviously blinded to this elementary truth by the excitement of discovering a "violation," because he kept exclaiming and pointing—"You were undersegregated that day! You were undersegregated that day!" Mrs. Economou tried to penetrate his state of excitement by pointing out that the adjustment just made could not possibly result in undersegregation, but made no impression at all. Mr. Chadonic was standing in front of an adding machine, and in such a situation, the normal reflex action of any accountant would be to add up the 7 or 8 columns of figures involved in order to prove his accusation. However, so great was Mr. Chadonic's agitation, that it was finally necessary for Mrs. Economou to firmly shove Mr. Chadonic aside and add up the figures herself while Mr. Chadonic continued to insist, "You were undersegregated that day." He was greatly chagrined when her adding machine tape proved the contrary and she later commented to me on his extraordinarily odd behavior. At the time, of course, we had no slightest suspicion that Mr. Chadonic was acting under orders to scrutinize our books very closely on the theory that probabilities would dictate that "something" could be found that could be interpreted as a "violation of the rules."

There were three additional aspects of the Chadonic audit which appear as most unusual and sustain the conspiratorial pattern that now has clearly emerged from the collective acts of the CEA officials and personnel since approximately April, 1969 onward. One of these is the fact that on completing his audit about mid-April, 1970, Chadonic did not meet with me in order to give me the customary post-audit report. Secondly, was his unusual behavior with regard to a trial balance which he had specifically asked our C.P.A. to prepare for him, as of February 28, 1970. At the time, our

C.P.A. was fully occupied with the tax season duties, but promised that he would have the trial balance ready by late April or early May. Mr. Chadonic said that he would return for it then. However, Chadonic never did return to pick up the trial balance that he had requested.

The third unusual aspect of the Chadonic interlude is so decidedly "queer" as to inject an element of mystery into the picture and cast a heavy cloud of doubt on Chadonic's veracity under oath. When asked on direct examination at the hearing why he had not returned for the trial balance our C.P.A. was holding for him at his request, he stated that he *had* returned, unbeknownst to either Mrs. Economou or myself, and consulted with another of our accountants, who is no longer in our employ or in the New York area. He testified that this accountant gave him the data he needed. However, we cannot give credence to this "tall tale" because, 1) this particular accountant had never worked in that area of our operation and was totally unfamiliar with it, 2) he did not have access to those particular books and records, 3) he would beyond any doubt have told us immediately had he been approached for information by Mr. Chadonic and 4) no one else at our office saw Mr. Chadonic from the day he left in April promising to return for the trial balance. Above all, it is beyond belief that even under the conspiratorial circumstances outlined, that a CEA employee would actually make such a surreptitious visit to a business office and neither of the principals in the business—or anyone else on the premises—learn about it until months later. It may have been a spur-of-the-moment means of rationalizing not having returned for the trial balance he requested, but at the very least, reflects serious discredit on an agency which would admit to employing such devious tactics.

During the Chadonic audit, he had mentioned that his audit represented the regular annual audit of the CEA. With that in mind, we were surprised in late April or early May by the arrival of still another CEA auditor, one Clement Gross, who informed us that he had instructions to do an audit. When we expressed surprise and told Gross that the regular annual audit had been completed just a couple of weeks before by Mr. Chadonic, with the exception of the February 28, 1970 trial balance he planned to return for, Gross said he didn't know about that, that he hadn't been

tied in on any previous audit but had just been told to come in and do an audit.

When we offered Gross the February 28 trial balance being held by our C.P.A. for Chadonic, he refused it, saying that it was not needed as he would require a trial balance as of the end of March. We told him that our C.P.A. was due in on the following day and would be glad to work with him on the March trial balance, but he refused this too, saying that he would prepare his own trial balance from our books "without bothering our C.P.A." We naively took this extraordinary procedure at face value and made our books available to Gross.

Gross completed his duties with remarkable speed—and at the hearing testified that he had been sent in to do a "quick examination" of our books and not a regular audit, in contradiction of what he had told us on his arrival—and without discussion or consultation with our C.P.A. or myself. It was during the course of preparing his personal "trial balance" that Gross falsified a valid reserve account into an account payable resulting in a completely untrue appearance of financial deterioration in my company at the rate of $4,000.00 per month for the first quarter of 1970, whereas, in fact, our financial standing showed no appreciable change for the quarter. It was this picture of financial deterioration manufactured by the CEA auditor, Clement Gross, which was incorporated subsequently into an expanded and amended complaint and released to the national financial press, credit agencies, the investing public and other interested persons.

I hereby state that the act of Clement Gross in distorting and falsifying our financial records is a criminal act and part of a criminal conspiracy knowingly and deliberately implemented by CEA officials and personnel for an evil purpose, which has caused great and irreparable damage to me and my companies.

I again implore the Court to intervene at this juncture of the CEA Docket No. 167 to protect me from such illegal acts on the part of this governmental agency bent on my destruction.

Following the refunding of all remaining customers' balances on our books as of April 24, 1970, we heard nothing further from the CEA concerning our reclassification from Section 1.17 to Section 1.31a. We had followed their specific instructions by refunding all customers' balances—but still

no word regarding the requested change in our status. I paid little attention to the matter as there appeared to be no urgency as the CEA knew that we were completely out of that aspect of our business and I was unaware that it was a vital part of the CEA conspiracy to keep us entrapped under Section 1.17.

About May, 1970, still another incident occurred which I considered very unusual but did not see the conspiratorial aspects or significance until this past year, when the entire spectrum of CEA acts fell into a pattern of an evil conspiracy that can be conclusively proved in a Court of law.

The incident revolves around the one and only serious complaint that the CEA ever received from a customer concerning the manner in which we handled his account. This customer lived abroad. In his letter of instructions to us relative to the closing out of his account, his grammatical structure and syntax was such as to render the instructions subject to varying interpretations, and we followed them to the best of our understanding by closing out his positions gradually rather than performing a simple "at-the-market" over-all close out. Specifically, he asked us to close out his positions "at the best time: the CEA later insisted that he should have been completely closed out on the spot.

Because of the manner and method used in closing out the account, as we understood the instructions, a loss developed in the account. The customer claimed that the loss sustained after we had received his instructions was $800.00; we claimed that, even if we were wrong, which was debatable, that the loss was only $400.00 and that claiming an $800.00 loss was a misunderstanding on his part.

He reported the matter to the CEA and around May, 1970, we were asked for our side of the story by Mr. Wolkis, then Chief Auditor, CEA New York Regional office. Wolkis, on the phone, immediately took the part of the customer in insisting that we owed the customer $800.00. I, quite as adamantly, insisted that if we owed the customer anything at all, it was $400.00, not $800.00.

Wolkis, pressing me to settle for the $800.00, finally blurted out that unless I settled for the full $800.00, *the CEA would institute fraud charges against me.*

I reported this extraordinary incident to the CEA national administrator in the presence of a number of his

associates at a meeting in his office in July, 1970, and I protested that this type of threat was uncalled for in view of my exemplary business record and of the fact that the issues involved were such that some reasonable compromise or adjustment could be employed to settle them.

I submit to the Court that this is just another example of the "ever-watchful for an opportunity to 'hit' Economou" attitude which the CEA had adopted as official policy starting in April, 1969, carrying through, in fact, to this very day.

After the CEA had closely audited the customer's account on our books, reverting to normal procedure by sending in a pair of auditors, instead of the "loner" technique employed in the auditing procedures involved in the "railroading" conspiracy, as exemplified by the Fitzpatrick, Gross and Chadonic "audits," and after considerable discussion with us and an explanatory letter from us, all concerned at the CEA finally admitted that we owed the customer only $400.00, not $800.00, as claimed by the customer and previously demanded by the CEA.

Unknown to us, from May through about mid-June 1970, my personal reputation was being maligned, and the reputations of The American Board of Trade and The Economou Financial and Development Corp. were being severely damaged through the action of the CEA in releasing controlled information in such a manner as to reflect adversely on me personally and the two organizations.

Specifically, it was brought to my attention that persons who made character inquiries to the CEA concerning The American Board of Trade were being supplied with copies of the February, 1970 complaint against me and Arthur N. Economou & Co., Inc. without mention of the fact that our answer to that complaint, in which we vigorously denied the allegations, and set forth the nature of our defense, was also on file with the CEA and that we had requested a hearing.

Specifically, it was also brought to my attention that a nationally-known credit agency, Dun and Bradstreet, had received copies of the complaint, and that copies of the complaint were a part of the credit information file that the agency had set up on The American Board of Trade and The Economou Financial & Development Corp. and that there was no mention whatever in said files that our Answer,

containing our denial and the nature of our defense, was also a matter of public record, or of the fact that we had requested a hearing in order to prove our innocence.

Once this procedure was called to my attention, I promptly telephoned McMinn, regional administrator of the New York CEA office, to protest this type of extremely damaging one-sided dissemination of information pertaining to The Economou Financial & Development Corp. and the ABT. The $300,000.00 stock issue, made effective on May 26, 1970 by the SEC, and which we had just started to advertise and promote to thousands of prospective investors who had expressed interest in participating in the financing of the new exchange and marketplace, would be seriously affected, I protested. Hundreds of investors contacting Dun and Bradstreet for credit information were being supplied with a copy of the complaint that somehow had lodged itself as an exhibit in the Dun and Bradstreet files of both The American Board of Trade and The Economou Financial & Development Corp., and without a hint that our side of the story was clearly on the public record, or that there even *was* another side to this story. McMinn's answer was that ". . . nothing can be done about it. That is our standard procedure."

I respectfully submit to the Court that such "standard procedure" may well be a violation of a citizen's Constitutional rights—in that poisonous information can be selectively injected into the commercial bloodstream of our nation, without the victim's knowledge and without a whiff of a chance on the victim's part to neutralize the pervasive and pernicious effect of such "standard procedure."

What we had not expected at all, especially after we had requested a hearing following the issuance of the initial complaint—the hearing which was not granted us—was the issuance of the expanded and amended complaint which struck at us out of the blue in June, 1970, coinciding with our announcement early in June of the stock issue in the amount of $300,000.00 offered for sale to the public by The Economou Financial & Development Corp. proceeds from the stock issue were to be used as "seed money" to launch the ABT complex.

The CEA thus effectively screwed down the lid on any possibility of success with the stock issue by means of the

expanded and amended complaint, issued June 22, 1970. The amended complaint incorporated the handiwork of the Gross falsification of our financial figures and was released to the national financial press to show the whole wide world not only that we were facing a charge of being underfinanced, but also that our financial position was deteriorating at the rate of $4,000.00 per month—both allegations CEA-manufactured and false.

May I ask the Court's forebearance at this point to interpolate that the investment public and the investment community *generally accepts as completely true* any formal, serious charge by a regulatory agency against a person or firm in that particular activity pattern.

In CEA Docket No. 167, however, the entire complaint, the allegations, the "facts," constituted a complete fabrication. The CEA contrived to manufacture the entire case against me by the expediencies of illegal, unethical and highly repugnant measures that included complete abrogation of the due process of law to which I am entitled under the Constitution.

May I also point out that we were not making use of nor desired to any longer make use of the "privileges" that are implicit in the Commodity Exchange Act, as the Commodity Exchange Act is being administered by the present CEA hierarchy. We no longer required the "privilege" of doing business under CEA rules—when such a "privilege" had been costing our customers $7,000.00 an hour for the use of the services that exchanges under CEA sponsorship offered. On the contrary, we no longer wanted any part of such "privileges." As previously explained, the CEA knew that we had started withdrawing from the business in July, 1969, when I made my last new commitment for clients under the "privileged sponsorship" of the CEA and closed out my final commitment for such clients in October, 1969.

Mention of Section 6(b) of the CEA rules in their expanded, amended complaint implied that I had filed false financial information with them. This might make sense of a sort had I been attempting to *retain* my commission merchant "privileges" under Section 1.17. But it makes no sense at all, under the circumstances, where I had made it clear and unmistakable that I was interested *only in my release* from their jurisdiction under Section 1.17, and had

been pleading with them for reclassification instructions. What would be my purpose in filing false financial information with the CEA?

The CEA news release pertaining to the amended complaint, as published on June 30, 1970 in the Wall Street Journal with a national circulation of about 1,400,000, stated in part: . . . "Commodity Exchange Authority alleged that the firm and Mr. Economou together were $13,000 below the minimum level for current assets as of December 31, 1969 and that the deficiency had grown to nearly $25,000 three months later." (underlining supplied.)

In truth and in fact our financial condition as of December 31, 1969 and as of March 31, 1970 were *practically identical.* For the CEA to publicly issue figures in the amended complaint to show that our financial position was deteriorating at the rate of $4,000.00 per month was a criminal act on the part of the CEA.

I hereby state that the aforementioned CEA allegations contained in the amended complaint and based on figures which Clement Gross, the CEA auditor, with the approval of CEA officials, deliberately and surreptitiously falsified and distorted in pursuit of a vile and evil purpose, is a violation of my Constitutional rights.

The damage caused by this criminal act to me personally and to the organizations which I have created and nurtured to life these past years, was substantial. The general description of said damage and the enormous physical and nervous strain that I personally, and my wife, have borne in CEA Docket No. 167, is set forth under Section "Q"—"Substantial Damage Inflicted Upon Me by the CEA"—in this affidavit.

Meantime, we had received no further word from the CEA as to the status of our re-classification from Section 1.17 into Section 1.31a, which requires no minimum financial requirements. As of April 24, 1970, we had closed out the remaining few accounts on our books and had completed refunding the credit balances to the customers involved. These were the instructions we had received from the CEA early in April and with which we had complied.

Finally, in August, 1970, in desparation, we petitioned the Secretary of Agriculture for our rightful freedom. This brought prompt action and our re-classification into Sec. 1.31a was accepted retroactively to April 24, 1970.

I should like to respectfully call to the Court's attention an interesting sub-section of Section 1.17 of the CEA regulations pertaining to the financial requirements of applicants under Section 1.31a which may be worthy of the Court's own view and interpretation, as it may apply to the issues of law which are interwoven throughout Section 1.17.

Specifically, Rule under Section 1.17(c) reads as follows:

> "(c) The minimum financial requirements prescribed in these regulations shall not be applicable to any applicant for registration as futures commission merchant to operate only in accordance with the provisions of Section 1.31a of these regulations, or to any registrant who in accordance with his application for registration is authorized to operate only in accordance with that section and who in fact at all times so operates." (underlining supplied)

The point of law that may be involved is whether, in the absence of specific guidelines in the rules as to procedure in re-classifying from Section 1.17 into 1.31a, can our request in February, 1970, made promptly upon receiving notice of the initial complaint, for re-classification instructions—can that request in itself be considered as "an application . . . to operate under Section 1.31a . . ."?? Can it be said, from the standpoint of legal interpretation, that we were indeed "applicants" for registration under Section 1.31a as of February, 1970, and that, in line with Section 1.17(c), we would accordingly be exempt from the minimum financial requirements of Section 1.17?

The possibility of such a reasonable application of Rule 1.17(c) escaped me from June 22, 1970, when the amended complaint was issued, up until recently. It probably did not escape the CEA hierarchy and their legal advisors.

Should the Court concur with the aforesaid possible application of Rule 1.17(c), then we should have been re-classified into Section 1.31a as of February, 1970, thus rendering the expanded complaint under CEA Docket No. 167 into a brand-new low in administrative agency infamy.

In our August, 1970 petition to the Secretary of Agriculture for re-classification, we also requested relief from the most damaging practice that the CEA was engaged in, and has engaged in continuously, and that is to mail and distribute copies of the complaint to all persons and organiza-

tions that inquired about my closely-linked affiliated organizations, without also making some effort at least to indicate that I, too, had a story on the record. We asked that the Secretary instruct the CEA hierarchy to supply copies of our Answer to the amended complaint, as well.

This p[illegible]tion was brusquely turned down by Richard Lyng, the Assistant Secretary of Agriculture, on behalf of the Secretary. "That's the way we do things . . . and that's the way we are going to keep on doing them," in effect, was his reply.

I filed an Answer to the amended complaint in mid-July, 1970. It consisted of 16 pages, including a 10-page single-spaced affidavit, in which I called the issues exactly as I saw them—a concerted plan on the part of the CEA to discredit me and the ABT, involving many of my basic rights.

As part of the affidavit, I included a background of my experience in the field and of the relatively impeccable reputation that I had built up over the years in a field in which a plethora of major and minor violations of the law occur and in which law suits are a daily way of life.

The entire affidavit in our Answer has been ignored by the CEA in CEA Docket No. 167. It formed one of the pillars in my defense, but a part of the pillar did manage to surface briefly at the hearing held in August, 1970. At the hearing, Richard Davis, the CEA prosecutor, specifically and clearly stated that the government was not contesting in any way the background material that I had set forth in the affidavit.

Yet, subsequent to the hearing, both Davis and the hearing referee, in the former's brief and in the latter's so-called "report," swept aside this portion of my defense and replaced it with a version more suitable to the attainment of character assassination. Davis' brief and the "referee's report," referred to me in identical words, since the referee's report was an exact photo-copy of Davis' brief, as "a shoe-string operation which is exactly the sort of thing Congress had in mind when it enacted financial requirements . . . most likely to dip into customers' funds or resort to sharp trading practices to bolster their money needs" . . .

This is but another example of the duplicity involved in the acts of the CEA in CEA Docket No. 167. In this case, they first lull me into believing at the hearing that my exemplary record in the field would be allowed to stand as

a pillar in my defense. Subsequently, in order to achieve their vile objectives, the pillar was brushed out of practical vision on the record—and replaced with a vicious, unwarranted and incongruous attack on my character.

On July 16, 1970, I personally filed our answer to the amended complaint with the hearing clerk in Washington and, while in Washington, I made an appointment to see the CEA national administrator at 2 P.M. and Richard E. Lyng, Assistant Secretary of Agriculture, at 4 P.M.

At the 2 P.M. meeting in the national administrator's office, which was attended by 8 or 10 members of the CEA hierarchy, including Mr. Robinson, Mr. Kirchhoff, Dr. Swantz, Mr. Williams, Mr. Davis, Mr. O'Brien and others, I told the national administrator that, in view of the maliciousness and the falsifications of facts and figures in the CEA amended complaint, I no longer intended to make any attempt to structure a line of communication with his office with reference to our plans to register The American Board of Trade under the Commodity Exchange Act, and that henceforth I was simply going over his head and make contact with the Assistant Secretary, Richard E. Lyng, the CEA national administrator's immediate superior. Furthermore, I stated frankly that we appeared miles apart in our conceptual thinking, as regards new and innovative operational approaches in the area of exchange functions and mechanisms of the futures commodity community.

At that same meeting, I related the incident that had occurred whereby Mr. Wolkis of the CEA New York office had threatened me with the institution of fraud proceedings unless we acquiesced to our foreign-land customer's unjustified insistence that we pay him $800.00.

During that same meeting, Robinson, deputy director for compliance for the CEA, again referred to The American Board of Trade as a "bucket shop,"—evidencing an uncalled-for hostility, that was also expressed explicitly by the CEA national administrator.

The four o'clock meeting with assistant secretary, Richard E. Lyng, was delayed until about 4:30 P.M., and I spent only 5 or 7 minutes with Mr. Lyng. I told him that I found it impossible to structure even a rudimentary line of communication with the CEA national office, as regards the ABT, for all I encountered at that level was hostility and determined resistance to any attempts on my part to

establish some form of two-way dialectic, in order to get on with the business of introducing a new exchange complex into the financial community. I called to Mr. Lyng's attention that the introduction of a specialist concept was paramount in our exchange structure and that help would be needed from the Secretary's office in establishing rules that would enable the specialist function to perform within the framework of the Commodity Exchange Act in its present form.

Mr. Lyng assured me that I did the right thing in going directly to him for a preliminary talk, in view of the apparent roadblocks that I was encountering at the national administrator's level. Furthermore, Mr. Lyng specifically agreed that the specialist function could readily be incorporated into an exchange operation. He pointed out that, in the securities field, there are many ways to establish a market price for securities—all sound and legal under our securities laws.

I was pleased to note such an apparent receptivity to at least one of the basic innovative areas of the ABT, and I told Mr. Lyng that I would be in touch with him in order to open up the way for eventual meaningful talks regarding The ABT's registration under the Commodity Exchange Act.

Within a few days after this talk with Mr. Lyng, I wrote to him to thank him for the consideration expressed for me and the ABT.

The hearing in CEA Docket No. 167 was held August 5, 6, 7 and 10, 1970 and is described in some detail under Section "L"—"The Mock Hearing"—of this affidavit. It was conducted in a totally unfair and discriminatory manner by Jack Bain, the chief hearing examiner of the U. S. Department of Agriculture. I appeared pro se, and with the exception of one afternoon when Mrs. Economou was with me and one forenoon when Mr. Radcliffe, our C. P. A., testified, I was the only person in the hearing room other than the CEA prosecution staff, CEA personnel, the referee and the Court reporter.

The duplicity, the illegality, the sham nature of the entire proceeding, will be brought out at the appropriate time in the instant action and can be readily proved in a Court of law. It was a two-way cooperative effort on the part of Bain, the referee, and Davis, the CEA prosecution attorney.

The objective was not to conduct a hearing to ascertain the facts, but to engineer the affair so that most of the very substance of my defense was blocked from appearing on the record and the CEA could expeditiously and legally find me guilty as charged.

Several basic approaches were employed, either deliberately, or on an ad hoc basis, to wind up the hearing as quickly as possible. The first of these was to get me to walk out on the whole CEA prosecution gang, which numbered 10 to 14 the first two days, but dwindled to 8 to 10 members on the last day-and-a-half of the hearing. The referee was particularly offensive. He kept shouting at me, kept shaking his finger at me, and at one point, rose to his full height, pointed his finger at me and screamed "Shut up!" At the time, there were 10 other CEA men at the table in the room, and I recall clearly the smug looks on their faces, reflecting the satisfaction derived from witnessing such humiliation of Arthur Economou. I have a further recollection of that moment in time when Bain screamed "shut up!" at me—I vividly remember my anguish and sharp shame that this could be taking place in America.

I remember, too, that it required more effort than I had ever before exerted in my life to remain composed under the attacks and to restrain myself from getting up and walking out of the hearing room. One "device" that I instinctively developed, which I found helpful at such moments, was to tighten my stomach muscles as hard as I possibly could whenever the referee would lash out. By doing so, I found that I could remain calm in demeanor and was able to counteract the almost overwhelming desire to flee such an environment. I knew that these almost intolerable pressures were deliberately being inflicted upon me for the express purpose of forcing me to either do something or say something which would give the referee an excuse to halt the hearing, which he repeatedly threatened to do, and I was determined to withstand any degree of pressure they might apply in order to continue the hearing through to its proper completion.

The pressures applied by the referee and the prosecuting attorney were both major and minor, but they were virtually continuous. For example, I was not allowed to refer to the government witnesses in any other but the most complimentary terms. At one point, for example, I referred to

Clement Gross, the CEA auditor, as "this young man," and Davis immediately protested "such a reference." I replied that as Gross was indeed a "young man"—23 years old to my 56—it was only natural that I should consider and refer to him as a "young man."

It so happened, and I am prepared to conclusively prove my allegations in a Court of law, that Clement Gross, the CEA auditor, not only falsified and distorted our financial figures and records in his April or May audit, but also criminally perjured himself when testifying under oath at the hearing.

Yet, at the hearing, I was not permitted to even allude to the possibility that Gross was not telling the truth. The following interchange between the referee and myself took place while Gross was on the witness stand at the hearing, (Transcript Page 175-176):

* * *

MR. ECONOMOU: I happen to know that Mr. Gross may not be telling the truth.

THE REFEREE: Mr. Economou, I want you to stop making slurring remarks during the progress of this hearing. I want you to start cross examining this witness right now or you will waive your right to cross examine him. You start asking him questions right now if you ever want to start.

* * *

Another area which was essential to our defense was the loose and abstruse manner in which Rule 1.17 was put together, which permitted almost any interpretation whatever that one might wish to place upon its numerous sub-sections and sub-sub-sections. Yet whenever I tried to broach this subject at the hearing, I was invariably stopped either through objections of the prosecution attorney or the referee, himself. In fact, this was the pattern of "bottling-up Economou" that was relentlessly pursued by the referee during the entire hearing in several other pertinent areas of our defense, such as the matter of due process, the accuracy of the government's witnesses' testimony and the modus operandi of the agency's information-processing and decision-making procedures. All of these areas were vital to our defense presentation—yet I was not allowed to cover

such subjects meaningfully, either in testimony or to offer argument thereon.

I was completely denied an opportunity at the hearing to present proper or adequate argument on these various vital areas of our defense. This was a particularly damaging blow to our defense, for we had fully and completely outlined the nature of such a defense in our Answer to the amended complaint, as requested in the amended complaint itself, which was signed by Richard Lyng, assistant secretary of agriculture. Specifically, the amended complaint stated, in part—

> ". . . The respondents will have 20 days after receipt of this amended complaint in which to file . . . an answer . . *fully and completely* stating the nature of the defense and admitting or denying, *specifically and in detail,* each allegation of this complaint . . ." (underlining supplied.)

In truth and in fact, the detailed completeness of our Answer supplied the referee and the prosecuting attorney a specific working guide as to the exact areas of our defense which they could then plan to exclude at the hearing.

In truth and in fact, the referee at the hearing in effect excluded the presentation of various areas of our defense prior to any attempt on my part to present said areas either in the form of testimony or argument. He excluded said areas, in advance, by referring to the pleadings that I had filed prior to the hearing and saying, openly and clearly, that he knew what areas we would present . . . that certain of such areas would be objected to . . . and that he would sustain such objections.

In other words, important areas of our defense were excluded, by common understanding between the referee and the prosecution attorney, from consideration even before the hearing started—even before they were presented for consideration.

I hereby allege that this high-handed type of CEA judicial modus operandi is a violation of my Constitutional rights.

On October 13, 1970, Davis, the CEA prosecution attorney, filed his brief, following the August, 1970 hearing. This is the brief that the referee photocopied and presented as "his" findings, "his" conclusions and "his" proposed order, ten months later; specifically, on August 17, 1971.

On December 17, 1970, I filed our various and relatively extensive briefs. The Court will recall that, at the August, 1970 hearing, we had not been permitted oral argument by the referee on any of our areas of defense, but the referee had stated that the issues of willfullness, of due process, of the Constitutionality of Section 1.17, were matters of "law" and therefore our side of the story based on these issues should be presented to him in the form of briefs. Our December 17, 1971 brief filings included briefs covering the issue of Section 1.17 Constitutionality, the issue of Willfullness and the issue of Due Process, each in extenso.

As set forth in Section "M," "Maliciousness of the Referee's Report," and in Section "N," "The Myriad Substantive Issues Ignored By the Referee," our December 17, 1970 brief, which formed one of the basic pillars in our defense, was completely ignored by the referee in his so-called "referee's report" filed in August, 1971. In fact, the referee's report also completely ignored Davis' subsequent reply brief, filed on February 10, 1971, in which the prosecution had switched its position on the question of willfullness, and also our compensatory supplement to the reply brief which we filed March 8, 1971.

In November, 1970, with the intensive and extensive effort that I was devoting to writing our brief for filing December 17, 1971, I felt that we had presented a very strong case in our favor and that, in view of the manifold and incontrovertable illegalities, unconstitutional actions, abrogation of due process, surreptitious falsifications and other misapplications of administrative power so conspicuous in CEA Docket No. 167, that the referee, however strong his bias, would actually have no choice but to dismiss the entire case.

Accordingly, about mid-November, I felt sufficiently encouraged by this view of our position to devote some concentrated effort on behalf of The American Board of Trade complex, especially in trying to attract members who are required to purchase their membership at $1,500.00 each, which sales were also to provide an important source of capital for the ABT complex.

To that point in the development of the ABT complex, we had received about 500 unsolicited membership inquiries, but did not have available the required printed by-laws, appliction forms and other literature required for membership promotion. As of November 1, 1970, only two memberships in ABT had been sold.

Now the literature and application forms had been designed and had been printed. Accordingly, I instituted an advertising campaign, by direct mail and in the Wall Street Journal and other financial media. One of the points that we brought out at that time in the promotions and the ads was that the ABT was preparing to register as a nationally-recognized exchange.

On November 9, 1970 in order to implement our plans for registration as a nationally-recognized exchange, I wrote to Richard E. Lyng, Assistant Secretary of Agriculture, stating that we were underway with the preparation of our application for registration under the Commodity Exchange Act. However, since we had departed quite sharply from traditional exchange operational procedures, and with substantive reasons for doing so, I wrote Mr. Lyng, it would be necessary to request special rulings from the Secretary of Agriculture relative to our application. In my letter, I requested a meeting at Mr. Lyng's office in Washington for a preliminary discussion concerning our unique approach to operating an exchange. Such a meeting, or meetings, I further pointed out in the letter, would serve as a foundation for our formal requests for rulings to the Secretary of Agriculture.

In my July, 1970 talk with Mr. Lyng, he appeared interested and even eager to cooperate in establishing a meaningful line of communication with me. I, in turn, was grateful for his expressions of interest and willingness to discuss the unique ABT concepts, for this meant that we would be establishing a sound relationship with the Department of Agriculture and such a relationship would clearly be needed to overcome and neutralize the extraordinary resistances and even venom emanating from the CEA hierarchy.

Lyng's reply was about 10 days in coming. There was no need for a meeting, I was told, for the Secretary of Agriculture could make no special rulings for the ABT. The requirements for registration are set forth in the Commodity Exchange Act, and the Secretary is governed accordingly, the letter stated. Lyng then suggested that we file our application—and they would advise us further about it.

This was a stunning reversal for the ABT. Lyng's letter represented a complete turn-around from the cooperative attitude expressed by him at the July meeting.

I hereby state that it was in November, 1970 that Richard E. Lyng joined the conspiracy to effectively vitiate The

American Board of Trade, and the very contents of his letter to me is indicative of the role that he was to play. The letter contained a half-truth—*in general,* the Commodity Exchange Act outlines the requirements for registration, but the specific rules and regulations that govern the functioning of an exchange are made and promulgated by the Secretary of Agriculture, who is specifically authorized to do so under Section 8a.(5) of the Act, which reads as follows:

* * *

> "Section 8a.(5) (The Secretary of Agriculture) is authorized to make and promulgate such rules and regulations as, in the judgment of the Secretary of Agriculture, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of this Act;"

* * *

Only through a special ruling by the Secretary of Agriculture could the ABT implement its concept of the specialist function on the floor of the ABT; only through special ruling of the Secretary could we hope to implement the wholesome function of administrative personnel executing orders on the floor of the ABT, and prohibiting members from trading for their own accounts on the floor of the exchange; only through special rulings by the Secretary could we operate the ABT on the basis of a centralized bookkeeping and accounting system rather than the present grotesquely inadequate and inefficient decentralized accounting systems.

Yet, a high-ranking official of the Department of Agriculture, Richard E. Lyng, states that the Secretary can make no special rulings on behalf of the ABT.

By refusing us an opportunity for meaningful interchange with cooperative personnel of the Department of Agriculture, he knew we would have to continue to grope in the dark in finalizing our rules and regulations for submission as a part of our application. Moreover, applications for registration under the Act are required to be first submitted to the CEA for consideration. It is the CEA national administrator who recommends to the Secretary whether a new exchange, and its rules, are acceptable. So, that put us right back to the place we had tried to escape from—the CEA national administrator's office.

Lyng's countermove, by ostensibly showing a "fair-minded" attitude in suggesting that we register, places us in a position where our registration would certainly be rejected, owing to the CEA's hostility—thus discrediting the new exchange anew within the financial community.

In a letter addressed to me only a few months ago, the CEA national administrator admitted that the ABT was referred to as a "bucket shop" at meetings which I attended in his office during 1970 and which are described in this affidavit. He also admitted that he would not have recommended that the ABT be approved as a recognized exchange under the Commodity Exchange Act.

I respectfully point out to the Court the conspiratorial duplicity structured by two high officials of the Department of Agriculture and the CEA. 1) The Assistant Secretary of Agriculture, in November, 1970, invites us to submit our ABT application for registration, knowing 2) that the CEA national administrator had already decided to recommend that the application be rejected.

I intuitively recognized that a trap had been set by Lyng's letter and I refused to enter the trap by submitting our ABT application. Thus, we were and are effectively blocked in our registration plans for recognition as an exchange under the Commodity Exchange Act.

In December, 1970, however, a new door of hope opened up for our registering as a nationally-recognized exchange. This new avenue developed initially in the form of a letter from Mr. Ezra Weiss, chief counsel of the U. S. Securities and Exchange Commission, Washington. It was a 3-page letter, in which Mr. Weiss, having learned through our announcements in the financial press that we intended to register the ABT as a securities exchange, set forth in detail the general registration requirements for a securities exchange and requested that specific data and descriptive material, Articles of Incorporation, by-laws and other information be filed with his office, but that the material all be addressed to Mr. Wolfson, one of his associates.

We were pleased to receive Mr. Weiss' letter, for it presented a golden opportunity to take the important step toward registering as an exchange which would bring with it the recognition and stature needed to attract members to the ABT complex and broaden the scope and the base of our operation.

I promptly acknowledged Mr. Weiss' letter by telephoning Mr. Wolfson—who, in turn, stated that our registration files and data would all be coordinated by another member of the SEC staff, Mr. Liebert. I then telephoned Mr. Liebert and talked to him on two or three occasions in detail pertaining to the plans of the ABT and also about a few of its unique and innovative conceptual and operational features. Mr. Liebert's attitude was very gracious and at two different junctures in our phone talks during December, 1970, stated that the SEC was only too happy to have an interchange of ideas and views on any exchange prior to registration, so that actual formal registration could then be filed and assured of prompt consideration and acceptance.

I asked around mid-December for a meeting with the SEC staff so that some of the material that Mr. Weiss had requested could be presented in person, and Mr. Liebert said that such a meeting could definitely be arranged. A few days later he telephoned me from Washington to say that a meeting could be held around the beginning of January, 1971. Meantime, we had completed mailing various packages of printed and mimeographed material that Mr. Weiss had requested. Though not specifically requested by the SEC, we also mailed the pleadings and briefs that we had on file relative to the CEA Docket No. 167. Mr. Liebert appeared generally to know about the CEA action against us but was apparently not familiar with the details.

There remained one basic presentation that I felt should be made in person to the SEC staff and that material pertained to the plans and concepts of a publicly-owned corporate body to act as specialist on the floor of the exchange, rather than the concept of individual members and member firms acting as specialist, as provided under the Securities and Exchange Act of 1934. This was an area I felt should first be personally discussed with the SEC staff, rather than simply including a written "cold" presentation on the subject with the material which we had mailed to Mr. Liebert.

On December 17, 1970, I personally journeyed to Washington to file our 50-page brief in CEA Docket No. 167. The filing was made at the hearing clerk's office, after which I walked along one of the corridors of the building in search of the cafeteria. In the corridor, I abruptly came face-to-face with the CEA national administrator and the assistant administrator, Dr. Swantz. They asked if I was planning

to call to see them and I said no, but would always consider an invitation to talk with them. I was promptly invited to pay them a visit and a few minutes later we were in the CEA national administrator's office, where Mr. Stulz of the CEA staff also joined us. We talked generally about CEA Docket No. 167 and I again repeated that they had started an action that was completely illegal and should be withdrawn. The CEA national administrator replied, in general, that should a decision finally be made against me that I could always appeal, as a normal part of administrative procedure. Within a matter of about 10 minutes after the meeting started the subject of discussion turned to The American Board of Trade and suddenly the CEA national administrator again referred to the ABT as a "bucket shop." I reacted sharply, with an involuntary expletive, pointing my finger at the CEA national administrator and in a raised voice told the three men that I was sick and tired of hearing the ABT called a "bucket shop" each time I called on the CEA national administrator. That was my third visit there during 1970 and on each occasion The American Board of Trade was openly referred to as a "bucket shop." Within a few minutes, I took my leave of the three men.

Early in January, 1971, Mr. Liebert of the U. S. Securities and Exchange Commission staff in Washington phoned and said that a meeting had been set up for late January. I agreed to the date. About mid-January, he called again to confirm the meeting date and at that time he asked me whether I planned to be accompanied by an attorney and I said no, for this was a meeting that would be devoted to the structure and the organizational concepts of the ABT, rather than the legal aspects.

My meeting with the Washington, D. C. staff of the U. S. Securities and Exchange Commission was held in late January, 1971. I had prepared a brief presentation of The American Board of Trade Service Corp.'s role as a specialist within the price-making "mechanism" of the ABT and also a list of questions on which clarification was needed from the S.E.C. staff.

The meeting was attended by five S.E.C. staff members. Mr. Wolfson, Mr. Liebert, Mr. Rosen, Mr. Saperstein, and a fifth member whose name I do not recall.

I started to thank the men for taking time out to see me, but Mr. Rosen, who conducted the meeting, immediately

interrupted to say that the S.E.C. staff preferred that I did not make any presentation, for I was not accompanied by an attorney. I replied that I could not understand why I could not, for I had been invited to meet with them, had prepared for the meeting and had journeyed to Washington for the specific purpose of meeting with them. Mr. Rosen then adopted a crisp and hostile attitude—an attitude that pervaded the remaining portion of the meeting and was displayed not only by Mr. Rosen but also by Mr. Wolfson and Mr. Saperstein. Mr. Rosen in particular was critical of and made an attack on some of the conceptual and operational features of the ABT exchange complex.

Mr. Rosen and the others turned a deaf ear to my pleas to be heard. They insisted that I first secure an attorney and arrange to meet with the S.E.C. staff either in Washington or in New York. I, in turn, was equally adamant about my right to make a presentation to a major government agency without being flanked by an attorney or two.

To reinforce my pleas to be heard, I specifically called the attention of the men to Section 6(a) of the Administrative Procedure Act which permits representation of a person in any agency proceeding either by himself, by counsel or with counsel. However, the men remained adamant.

Toward the end of the 20-minute meeting, I became quite indignant and said outright that obviously the five men had their orders not to discuss the ABT and that, once again, I was being treated unfairly by a government agency. I also made it clear to the S.E.C. staff that registration was of paramount importance to us and that it was essential that I be allowed to respond to Mr. Weiss' request that I file basic data with the S.E.C. as a prelude to actual registration. However, my pleas were of no avail.

At first, I simply could not understand this sudden change in the S.E.C. attitude—from an attitude of cooperation, as exemplified by the S.E.C. approval of two of my stock issues in 1969 and 1970 involving new concepts, The Precious Metals Syndicate for $2,500,000.00 and the E.F.&D. for $300,000.00, to one of callous indifference and open hostility with respect to the ABT, with absolutely no logical explanation being given for the abrupt change.

Shortly after the Washington S.E.C. meeting, I arranged to meet with two members of the S.E.C. New York staff. This second meeting, held in March, 1971, was conducted by

Mr. Sorokin of the S.E.C. New York staff and I was accompanied by an attorney. The attitude of Mr. Sorokin, however, was similar to that of Mr. Rosen—brusque and hostile. I was asked by Mr. Sorokin to answer questions pertaining to the ABT and its operations and, in turn, I submitted printed material and data pertaining to our new exchange.

Since the meeting with Mr. Sorokin, I have been unable to develop the meaningful relationship with the U. S. Securities and Exchange Commission that would be required to finalize our rules and regulations prior to submitting our formal application for registration under the Securities and Exchange Act of 1934. I have been treated by the SEC as persona non grata. I cannot as much as get a SEC official to talk to me on the telephone.

Information and evidence is now at hand and available to me to show conclusively that the members of the CEA hierarchy were in close communication with officials and personnel of the U. S. Securities and Exchange Commission during December, 1970 and January, 1971, with reference to the operations of The American Board of Trade. During this period of time, the CEA conveyed distorted, false and libelous information to the SEC for the specific purpose of creating a situation of animus between the SEC and the ABT and thus thwarting our plans for registering the ABT with the SEC. The CEA actually did succeed in its objective of creating the conditions that made it impossible for the ABT to pursue its plans for registration. These acts by the CEA, I submit, are part of the conspiratorial acts of the defendants since the conspiracy was formulated in April, 1969, and a violation of my Constitutional rights.

On February 10, 1971, the CEA prosecuting attorney, Richard W. Davis, Jr. submitted his reply brief to the brief that I had filed in CEA Docket No. 167. In his reply brief, Davis deliberately manufactured facts to serve as a base on which the referee could subsequently reinforce his predetermined goal of finding us "guilty as charged."

Specifically, Davis manufactured a post-audit interview that Fitzpatrick had supposedly held with me, when in truth and in fact such an interview had never been held. Davis also attempted to tie in the Jackson and Chadonic post-audit interviews to support the CEA "case," whereas these interviews were not related in any manner to the question of the validity of the documentation of our assets.

In addition, Davis asserted in the reply brief that willfullness on our part had been alleged and proved by the CEA in CEA Docket No. 167, whereas no proof whatever had been presented that we acted willfully. In fact, the CEA has made no effort to present evidence of any kind to sustain their charge that I acted willfully.

The Davis fabrications are set forth in somewhat more detail under Section "P"—"Extensive Pattern of CEA Falsifications"—of this affidavit.

On March 8, 1971, I filed, with the permission of the referee, a brief entitled "Compensatory Supplement to Brief." I had requested permission to file said brief in order to compensate for a 25-day extension of time granted by the referee to the CEA prosecution attorney for filing of the CEA's reply brief. The 25-day extension of time had been granted by the referee without notice to us or consideration of our views, as explicitly required by the rules under the Commodity Exchange Act.

Matters of granting of extension of time are covered by Section 0.22(c) of the rules, which states, in part:

* * *

"(c) Extensions of time. The time for filing of any document or paper required or authorized under the rules * * * may be extended by the referee * * * *after notice to and consideration of the views of the other party.*" (Underlining supplied.)

* * *

Since the referee had made no attempt to give notice to us or to consider our views in granting a 25-day extension of time to the prosecuting attorney for filing of a key brief, I felt that this was still another example of violation of rules by the CEA hierarchy for the purpose of achieving a predetermined objective. I accordingly protested the unfair advantage given to the CEA prosecution to prepare a key brief in the proceeding—to which normally, under the rules, we would not be permitted to reply. For that reason, I felt that we, too, should have extra time in which to prepare additional briefs, to compensate for the advantage that had been improperly gained by the CEA prosecution attorney.

It is fortunate that we did ask for permission to file our "Compensatory Suplement to Brief" for it was in the reply brief that Davis, the CEA prosecuting attorney, dis-

torted and manufactured facts concerning the activities of the three CEA auditors in a manner as to illegally reinforce the government's "case." Our "Compensatory Supplement to Brief," then, served to bring the record of the CEA Docket No. 167 at that point into more accurate balance.

In July, 1971, we filed protest on the record of CEA Docket No. 167 relative to the delay in receiving the referee's report, which, according to Section 0.16(c) of the rules of the Commodity Exchange Act, is to be filed by the referee "within a reasonable time." We were still confident that, regardless of personal bias, in view of the facts engraved on the record of CEA Docket No. 167, the referee would have no choice but to exonerate us completely. Yet, over five months had gone by and we were still struggling under the cloud of these fabricated charges.

Early in August, I tried to follow up by phone to the CEA offices to ascertain the status of the expected referee's report, but to no avail. Shortly thereafter, I filed a formal protest with the Secretary of Agriculture and requested that he direct the referee to file the report without further delay.

On August 17, 1971, the referee filed his so-called "referee's report," an actual photo-copy of the prosecuting attorney's initial brief. We vigorously protested the maliciousness and unfairness of the "referee's report" in a formal letter of protest to the Secretary of Agriculture. In that letter, we also pointed out that the referee had abdicated his responsibilities and, by his acts, had joined in the CEA conspiratorial plan and had reinforced the monolithic structure of the CEA's assault, against which there could be no hope of meaningful defense.

The "referee's report" of August, 1971, served to completely confirm the structure and purpose of the CEA assault upon me and The American Board of Trade, and that the entire CEA Docket No. 167 should now be a matter of equity in a U. S. District Court. I knew, too, that further substantial and irreparable harm would occur if the CEA were allowed to proceed with its conspiratorial assault.

The CEA monolithic assault made it impossible for us to surface issues of fact and law in our defense; the CEA also made it impossible for us to surface on the record of CEA Docket No. 167 any of the issues of fact and law which

clearly indicated that an organized conspiracy had been in progress since April, 1969.

It was my decision in October, 1971, to prepare to ask a U.S. District Court to intervene and assume jurisdiction in CEA Docket No. 167, and I so advised the CEA.

* * *

"L"

The Mock Hearing

A so-called "hearing" relative to CEA Docket No. 167 was held in New York City on August 5, 6, 7, and 10, 1970, before Chief Hearing Examiner Jack W. Bain, U. S. Dept. of Agriculture, as referee. I appeared pro se, on behalf of my company and myself. The transcript of the hearing contains 551 pages.

I hereby state that the entire hearing proceeding was a sham and a farce and conducted by the referee in a totally unfair and discriminatory manner designed to bully me into a manner of presentation which would obscure the force of my presentation. Further, the proceedings were featured throughout by repeated characterizations of the CEA's witnesses as being of veracity beyond question, whereas my testimony, witnesses, opinions, contentions and objections were consistently treated with scorn.

I hereby state that the conduct of the referee at the hearing was in direct and clear violation of Sec. 0.7(c) of the Commodity Exchange Act, which states that the referee shall conduct the hearing in a "fair and impartial manner," and that the referee's conduct was also in direct and clear violation of the Administrative Procedures Act and in violation of my Constitutional rights.

I hereby state that the referee conspired, as a bona fide member of the prosecution team, to structure the hearing in a manner as to exclude evidence that would strengthen our position, but to include all evidence that the prosecution contrived to present.

I was consistently cut short in pursuing relevant lines of inquiry and refused the right to make further inquiry, cross examinations and offers of proof. I hereby state that this was a direct violation by the referee of Sec. 0.7(c) and evidence of the conspiratorial nature of the hearing which was, from the standpoint of the CEA, a link in the overall process

of "railroading" me and my affiliated enterprises to disaster.

Heresay statements of a third party, required by law to be a totally independent party, were allowed in the record, on the ground first that he was a "member of the organization" and secondly an "agent"; both untrue and unproven. I hereby state that this is another example of how rules and regulations can be interpreted as desired and at will by CEA officials in order to achieve an objective, as, for example, the destruction of The American Board of Trade, which has proposed and has implemented procedures and operations designed to eliminate the many dysfunctions of the present archaic exchange system which has proved so harmful and injurious to the investing public and to trade groups these past 30 years.

The referee consistently refused to allow any questioning or examination by me with respect to interpretation of the policies, rules and regulations of the Commodity Exchange Authority, although such was essential to the case and an integral part of my defense. I hereby state that this "holier than thou" and "the government can do no wrong" attitude on the part of the referee precludes even the possibility of a fair and impartial hearing, as would be required by any responsible judicial process and by Sec. 0.7(c) of the Commodity Exchange Act and the Administrative Procedures Act. Accordingly, the hearing was a sham and in violation of my constitutional rights.

The referee refused my requests for subpoena assistance in such a manner as to frustrate the proper presentation of my defense, and so as to frustrate offers of proof.

The referee refused to allow my requests for necessary and appropriate recesses, where required for adequate preparation of our defense.

Our presentation of testimony in our defense was repeatedly, inequitably and in a discriminatory manner cut short and objections improperly sustained thereto so as to frustrate our defense and offers of proof.

Referee repeatedly threatened to cancel the hearing and allow "each side to file briefs," owing to the apparent lack of knowledge on my part of the proper procedures in the hearing. I was thus intimidated and inhibited, for fear of making statements that would displease the referee.

The referee bullied me, literally, into answering a highly improper line of questioning under cross-examination by threatening to delete all my testimony in the hearing if I did not answer the improper line of questioning.

The referee made no effort to arrange for a pre-hearing conference as required by the rules, particularly in view of my inexperience as a hearing participant. When I brought the matter up, after hearing had opened, referee allowed exactly 3 minutes for the pre-hearing conference. I was at a distinct disadvantage throughout the hearing owing to the lack of a proper pre-hearing conference.

Throughout the hearing, the referee kept stating that various matters of willfullness, due process and questions of the rules and regulations of the CEA were "legal" matters and should properly be argued in brief form to be submitted to him after the hearing closed.

Yet rule under Sec. 0.57(d)(8) explicitly states that the referee may, at the hearing, "Hear oral argument on facts or *law*" (underline supplied).

I hereby ask: If we are not allowed to present facts of law at the hearing and are told that such belong in a brief, then, when the briefs are filed but are ignored or thrown in a judicial wastebasket by the referee, just when are these arguments or facts of law taken into consideration in the judicial process, as implemented by the CEA?

* * *

"M"

Maliciousness of the Referee's Report

For over five months, March 8 to August 17, 1971, we had eagerly awaited the referee's report. We expected and had the basic right to expect that the referee, as a judicatory official of the CEA, would objectively evaluate and give due consideration to our side of these proceedings, which, over the previous 20 months we had presented in the form of—

1) Our answers and affidavits filed in response to the allegations;

2) Our Letters of Petition to the U.S. Secretary of Agriculture for relief from quest onable, illegal and even unconstitutional actions on the part of the CEA;

3) Our testimony and evidence presented at the 3½-day hearing held in New York City in August, 1970;

4) Our findings of fact, conclusions and briefs filed in December, 1970, (50 pages) and in March, 1971 (19 pages) in which we specifically set forth the numerous basic issues of law that have been raised by the CEA acts, involving our constitutional rights, deprivation of due process and illegal acts on the part of the CEA including surreptitious falsification of our financial records and the release to the public and the press of an amended complaint containing falsified data pertaining to our financial condition.

I repeat: We expected and had a basic right to expect, once the proceedings attained the level or point where a CEA judicatory official had the CEA allegations and the entire spectrum of our responses thereto, in front of him, that the judicial aspects and functions of the CEA Docket No. 167 proceedings would be implemented in an objective manner and with fairness.

Yet, the referee's report made no attempt whatever to even list or mention, let alone analyze and consider, the various aspects of our vigorous and extensive defense against the deliberately fabricated allegations of the CEA.

And, the referee's report made no attempt whatever to even list or mention, let alone analyze and consider, the myriad issues of law, involving our constitutional rights, deprivation of due process and illegal actions on the part of the CEA, which we raised in our defense and which are set forth explicitly in the record of CEA Docket No. 167.

On the contrary, the referee's report can be classified as a most malicious document and is clear evidence that the referee literally and shamefully abdicated his responsibilities in CEA Docket No. 167, and joined with the CEA heirarchy and prosecution in their shameful campaign to destroy my reputation, and by this means, destroy The American Board of Trade which I have founded and which I head.

The referee's report consisted of 23 pages—*of which, we were shocked to discover, 20 pages were actually xeroxed or photo-copies, with minor alterations, of the CEA's brief filed against us in CEA Docket No. 167 on October 13, 1970.* Yes, these 20 pages of the so-called "referee's report" were actually written and filed by Richard W. Davis, Jr., the CEA attorney, in his role as prosecutor for the government's "case" against us.

So the judiciary process or aspect of CEA Docket No. 167 now has openly and unashamedly merged and blended with

the prosecution function of the CEA. Thus, we are faced with a powerful monolithic attack by the CEA, in which a judicatory official has enlisted in the services of the department of prosecution in the CEA—in the attempt to inflict discredit upon us and to destroy the various organizations which I head in the commodity field.

The very thought of a CEA judicatory official photo-copying, after a 5-month delay, 20 pages of a document written and filed by the CEA prosecuting attorney and presenting the 20 pages as "his" findings, "his" conclusions and "his" recommendations is an affront to the judicial processes of our nation, and in blatant violation of even the CEAs own regulations pertaining to the content of the referee's report. Such a procedure might be comprehensible given a clear-cut "open and shut" case with no valid defense. However, in this case where we presented a powerful and apparently unanswerable defense, and, in addition, raised many issues involving illegal and unconstitutional activity on the part of the CEA, for the referee to act as if our entire case had been filed into his official wastebasket and was non-existent, is nothing short of display of judicial arrogance and abdication of all pretense to judicial propriety.

This monolithic approach to "justice"—whereby the judiciary function blends, synthesizes and forms, literally, a perfect congruity with that of the prosecution is even more abhorrent and frightening when one considers that the CEA also acted as the rule-maker, and supplied their own special made-to-order-to-suit-the-need interpretation of their rules.

Thus the referee has overtly zeroed-in for the "kill." The monolithic structure of CEA Docket No. 167—involving the CEA rule-making . . . CEA interpretation of all the rules . . . CEA investigation and so-called "fact-finding" . . . CEA manufacture of the "facts" they found by falsification of our financial records . . . CEA presentation of these contrived "facts" in the prosecution process—has now been confirmed and reinforced by the CEA judicial function—and the entire process has coalesced and molded into an instrument of destructive power for the purpose of annihilating a newborn organization, The American Board of Trade.

I submit the following as specific evidence of the maliciousness of the referee's report.

1) The referee had over five months in which to evaluate

and weigh the various issues and aspects of the proceedings in CEA Docket No. 167, which are already clearly set forth in the record. For the referee to photo-copy 20 pages of the presecution's brief against us and to place these 20 pages in the record as "his" findings, "his" conclusions and "his" recommendations is not only evidence of maliciousness, but also of judicial arrogance and misconduct.

2) The above-mentioned 20 pages filed by the referee on August 17, 1971, were written and filed by the CEA's attorney on October 13, 1970. For the referee to file the 20 photo-copied pages as "his" report, and to ignore the briefs filed by us in December, 1970 and March, 1971, is evidence of maliciousness, arrogance, and judicial misconduct.

3) It is a malicious act on the part of the referee to "recommend" in "his" report of August 17, 1971 that my company be suspended as futures commission merchant for 90 days. The truth is that my company *resigned on December 3, 1970 as registered commission merchants, in protest of the manner in which the Commodity Exchange Act was being administered to the detriment of the investing public.* Therefore, this recommendation for a suspension which cannot be implemented is a dishonest act with the sole purpose and result being to create *a false impression on the record that my company is subject to suspension, and actually may be suspended.*

4) It is evidence of maliciousness, and of judicial arrogance and irresponsibility for the referee to allow to remain in "his" report a serious misquotation of the Supreme Court of the U.S. This misquotation was contained in the government's brief filed October 13, 1970 and specific attention was called to this serious misquotation in our brief filed December 17, 1970.

5) It is arbitrary, malicious and malevolent action on the part of the referee to present in his photo-copied "conclusions" of August 17, 1971 the statements in the government brief filed October 13, 1970 that our business typified the type of shoestring operation Congress had in mind when it enacted the financial requirements of Section 4F(2) of the Act, and that (such firms) "have been found most likely to dip into customers' funds and resort to sharp trading practices to bolster their money needs." The foregoing is a libelous statement. It has no relation whatever to our exemplary business record, long known to the CEA; to the

fact that, by their own admission, the CEA was ignorant of our over-all financial condition and to the fact that since the outset of this case we had been out of the business and all customers' funds were refunded long ago.

6) I hereby respectfully suggest to the Court that the foregoing are not only evidence of maliciousness of the referee's report and the abdication by the referee of his responsibilities in CEA Docket No. 167, but also in overt violation of the term "referee's report" as specifically and explicitly set forth under Sec. 0.2(n) of the rules and regulations under the Commodity Exchange Act. Section 0.2(n) reads as follows:

> "The term "referee's report" (presiding officer's report) means the referee's report to the Secretary, and includes the referee's proposed (1) findings of fact and conclusions with respect to *all material issues of fact, law or discretion, as well as the reasons or basis therefore,* (2) *order, and* (3) *rulings on findings, conclusions and orders submitted by the parties.*" (underlining supplied)

* * *

"N"

The Myriad Substantive Issues Ignored by the Referee, Who Thus Abdicated His Responsibilities

Numerous substantive issues of the law, and of facts, are interwoven within the framework of the proceeding in CEA Docket No. 167 involving our Constitutional rights, deprivation of due process and illegal actions on the part of the CEA. All these issues were ignored by the referee in his "report."

Specifically, the "referee's report" made no mention of . . . made no attempt to take into consideration . . . made no attempt to rule upon or to weigh or judge . . . the following issues which have been raised and are a part of the record of the proceedings:

A) . . . that the CEA had no legal, factual or moral basis for its complaint against us in February, 1970, alleging underfinancing, with said "underfinancing" actualized by the CEA itself in disallowing certain of our assets. The CEA did not question the existence of the assets, but disallowed them, surreptitiously and retroactively, by the

expedient of asserting that they were not correctly documented to meet the brand-new CEA rules under Section 1.17.

B) . . . that the rules under Section 1.17, on which the complaint was based, are so abstrusely and amorphously written that the CEA may interpret and apply them in any manner they desire; the rules under Section 1.17, therefore, constitute deprivation of due process and are in violation of our Constitutional rights;

C) . . . that due process involving proper notification to us was not observed by the CEA on numerous occasions, thus violating our Constitutional rights;

D) . . . that the CEA's allegation that we *willfully* violated Section 1.17 of the rules is without legal, factual or moral foundation, and is completely contradicted by our unchallenged testimony at the hearing and in briefs detailing our extensive efforts to cooperate with the agency in meeting their requirements under the new regulations. The CEA's arbitrariness and maliciousness in alleging that we "willfully" violated Section 1.17 of their rules, thus enabling them to "legally" issue a complaint without the need to advise us or afford us the customary due notice as required by law, is set forth in detail under Section "O" in this affidavit.

E) . . . that the CEA, in abrogating due process, attempted to structure a convenient, self-serving legal base through the use of its own special made-to-order concept and interpretation of willfullness in CEA Docket No. 167, which is in contradiction to the definition of willfullness established by the Supreme Court—and in so attempting to structure its position, acted arbitrarily and maliciously and in violation of our Constitutional rights. The CEA's illegal acts in depriving us of customary due notice of possible violations, as specifically required under Section 0.3(c) of the rules and regulations of the Commodity Exchange Act are set forth under Section "O" in this affidavit.

F) . . . that the CEA's February, 1970 complaint against us and subsequent actions, steps and measures taken by the CEA in this proceeding, were intended specifically to effectively vitiate, if not completely destroy, The American Board of Trade in its fledgling stage, by discrediting me as its founder and shaking public confidence in the new enterprise;

G) . . . that the CEA, in contradiction to their customary

and expected policy of giving notification of possible violations repeatedly, both verbally and in writing, "in order to afford the firm an opportunity to bring itself into compliance," as required by Section 0.3(c), did not notify us at all that they were retroactively and secretly declaring a large portion of our assets invalid in order to bring damaging charges against us long after I had ceased trading under their jurisdiction and had launched The American Board of Trade, clearly both maliciousness and denial of due process;

H) . . . that the CEA did not question our assets as reported on our initial statement dated March 31, 1969, which led us to file our June 30 statement with substantially the same assets. Many months later, when all trading activity under CEA jurisdiction had ended and The American Board of Trade was launched, the CEA retroactively and without due notice to us disallowed many of these assets and based their complaint against us on the under-financed condition which resulted from their own surreptitious actions;

I) . . . that through a process of entrapment (See J-6) the CEA kept us under their jurisdiction, subject to their financial requirements and vulnerable to their malevolent attack long after we had requested our rightful freedom. It required an eventual petition to the Secretary of Agriculture to finally attain our freedom, which was made retroactive by several months;

J) . . . that 8 months after we had effected our last trade under their jurisdiction, the CEA filed an expanded complaint based on their own falsification of our financial figures, and that in this effort to expand and strengthen their "case," they overstepped all bounds of basic legal, moral and ethical standards by unconstitutional conduct in numerous areas, including:

1) The surreptitious falsification of our financial records to show a totally untrue picture of financial deterioration at the rate of $4,000.00 per month, as of March 31, 1970, by secretly re-classifying a valid reserve account into an account payable;
2) Incorporating the falsified figures into an expanded complaint, without notice to or discussion with us about the arbitrary re-classification;
3) Making the amended complaint available to the press, assuring nationwide publicity relative to this

false picture of a steadily eroding financial structure, which caused extremely heavy damage to The American Board of Trade and its affiliated organizations;
4) Timing the amended complaint and press release to coincide with the first public announcement of a stock offering by The Economou Financial and Development Corp., which was issued for the purpose of financing The American Board of Trade, with the effect of vitiating the sale of the stock issue;
5) After receiving notice of the complaint in February, 1970, we asked for a hearing to determine the validity of the complaint; *that hearing was not granted us;*
6) Promptly upon receiving the initial complaint in February, 1970, we asked for instructions for reclassifying from status under Section 1.17 to status under Section 1.31a, which has no financial requirements, in view of the fact that we had almost completed phasing out of business, yet the full instructions were not forthcoming until we petitioned the U. S. Secretary of Agriculture for relief late in July. This action of entrapment on the part of the CEA was a clear violation of our Constitutional rights.

I hereby state that the referee, in omitting mention of and making no attempt to take into consideration the foregoing, abdicated his responsibilities in the judicial process that is explicitly and implicitly required in administrative proceedings of this type, in order that our side of the story might receive fair and just consideration.

In addition to the foregoing, I also set forth the following additional significant and substantive omissions in the referee's report:

K) . . . At the hearing held in August 1970, at which I appeared pro se, I raised many issues pertaining to willfullness, deprivation of due process, illegal acts on the part of the CEA, and unconstitutional aspects of the new Sec. 1.17 of the rules. I was told by the referee that these issues were "issues of law" which should be properly filed for consideration by him in the form of briefs. These briefs were filed in December, 1970 and March, 1971. The

fact that the referee did not even recognize or acknowledge these issues is evidence that he has abdicated his responsibilities in these proceedings.

L) . . . I have stated repeatedly in the proceedings in CEA Docket No. 167 that the CEA's actions and allegations were without legal or factual foundation. The referee did not rule on this position and in not ruling, abdicated his responsibilities.

M) . . . The referee filed his "report" on August 17, 1971 of which 20 of the 23 pages were photo-copies of the CEA's prosecution brief filed in October, 1970. In congruently and identically submitting the prosecution's "case" as "his own" the referee has completed, reinforced and confirmed the monolithic structure of the CEA's attack, and in enlisting in the services of the prosecution, the referee overtly abdicated his responsibilities in these proceedings as a judicatory official. He has now openly become a full-fledged member of the CEA prosecution team, *leaving us with no vestige of hope that our side of this case will receive a fair judicial appraisal—or indeed, any appraisal at all.* The referee's omission of any appraisal or even mention of our side of the story thus leaves us without any hope whatever that we will receive fair treatment or even consideration in CEA Docket No. 167.

N) . . . I have stated repeatedly that the CEA's auditors deliberately and surreptitiously falsified our records without notice to or consultation with us and used the falsified records in an expanded complaint. The referee did not rule on our position, and thus abdicated his responsibilities.

O) . . . I filed an extensive brief in December, 1970, detailing the unconstitutionality of Sec. 1.17 of the rules. The referee did not rule on, or even attempt to analyze this position. In not facing this problem, the referee has abdicated his responsibilities.

P) . . . I filed an extensive brief in December, 1970, setting forth reasons why we did not *willfully* or in any manner whatever violate the law. The referee made no meaningful attempt to analyze judicially the question of *willfullness* and in avoiding this analysis, he abdicated his responsibilities.

Q) . . . I filed an extensive brief in December, 1970, setting forth reasons why we were not afforded proper due notice of any violation, in any form whatever. The referee

did not rule on our claims and in not ruling abdicated his responsibilities.

R) . . . I have maintained in briefs filed in the proceeding in CEA Docket No. 167 that we were entrapped by the CEA under Sec. 1.17 and prevented from re-classifying to Sec. 1.31a from February, 1970 to August, 1970 and that it required a Petition to the Secretary of Agriculture to release us from this trap. The referee did not rule on this entrapment claim, which is illegal and unconstitutional, and in not ruling, abdicated his responsibilities.

S) . . . As a matter of fact, the referee did not rule on any issue or any question of law which we have raised, as he is specifically required to do under CEA rules and regulations and under the Administrative Procedure Act. In not facing the explicit and implicit need for required judicial process the referee has abdicated his responsibilities.

T) . . . In and as a part of our Answer to the Amended Complaint, we filed an affidavit in which we set forth my background of experience in the commodity field, consisting of 15 years during which I had achieved basic expertise in administrative matters, including legal and accounting procedures, and during which I had achieved a record of conduct that was impeccable and that was not marred in any way with even minor misconduct in any form. This exemplary record was not contested by the CEA at any time, nor was it the intention of the CEA to contest this record, as evidenced by Mr. Davis' statement to this effect at the August, 1970 hearing, yet the referee makes no mention of or takes into consideration at any point in the report the significance of a person's character, reputation based on wholesome contribution to his field of activity, *and to the reliability of such a person's testimony in proceedings of this kind.* We are asked to file our side of the story, to testify—then all is conveniently ignored by the referee. This is a substantive omission in the referee's report, in not taking into consideration *even an iota of evidence given to support our position.*

U) . . . On page 14-15 of our Compensatory Supplement to Brief filed March 8, 1971, we requested that the CEA produce evidence in the form of factual answers to four questions, demonstrating that our reserve account, which the CEA surreptitiously and falsely re-classified into a liability on our books, met with their own definition of a

liability, as they have repeatedly claimed. The CEA has not answered these questions and indeed cannot. Yet the referee, in now doing his duty as a faithful member of the prosecution team, makes no mention of this fact.

V) . . . The referee failed to submit his report on the Prehearing Conference as specifically required by Sec. 0.15 of the rules and regulations of the Commodity Exchange Act. This omission is highly significant in that it buries the fact that the Prehearing Conference was held *at my specific request after the opening of the hearing* in New York on August 5, 1970, and that it was conducted by the referee in a farcical, meaningless and illegal manner. Failure of the referee to submit his report on the Prehearing Conference is still another example of the irresponsibility of the referee.

W) . . . I have set forth in the record of CEA Docket No. 167 that a pattern of malicious intent is clearly evident in the acts of CEA officials and personnel. Significantly, in February, 1970, after the American Board of Trade was underway and after I had ceased trading under CEA rules, we were unexpectedly bludgeoned by the CEA complaint retrospectively alleging that we were underfinanced, under their interpretation of their new rules, during two successive quarters the previous year. The CEA made this farcical complaint possible by unilaterally and without notice to or consultation with us, retrospectively disallowing a large part of our valid assets. In other words, when our first financial statement was filed in 1969 all of our assets were apparently acceptable to the CEA. Otherwise, they would surely have followed their customary procedure and informed us prior to our filing a second statement three months later with substantially the same assets. Still nothing was said to us. In fact, it appears that our assets were acceptable until after The American Board of Trade was launched and we were no longer doing business under the jurisdiction of the CEA. At that point, when the agency was casting around for some means to discredit the new exchange, the assets suddenly became retroactively unacceptable and were secretly disallowed in order to form the basis of a complaint against me in denial of my constitutional right of due process. The CEA did not try to pretend that the assets were not there, but based this entire

complaint on the belated claim that they had not been acceptably documented. The referee makes no mention whatever in his report with respect to these allegations which, in any judicial process, must be considered as highly substantive issues.

Each and every "Proposed Findings of Fact," each and every one of the "Proposed Conclusions," and each and every "Proposed Order" in the so-called "referee's report" is a sham and a judicial fraud and this does not in any way constitute a proper report within the spirit and intent of the Commodity Exchange Act and of the Administrative Procedure Act.

On the contrary, the "referee's report" represents total abdication of his judicial functions in these proceedings, as outlined supra. The "Proposed Findings of Fact," the "Proposed Conclusions" and the "Proposed Order" which appear in this referee's report, are, in fact, photo-copies of the "Complainant's Suggested Findings of Fact, Conclusions and Order, and Brief in Support Thereof" which was filed by Richard W. Davis, Jr., attorney for the Commodity Exchange Authority, on October 13, 1970. This pure and simple "lifting" of the prosecution's paper, is obvious upon even cursory inspection. Even the original spelling errors were accepted and reproduced. It is interesting and pertinent to note that this photoing of the government's position took place after the referee had made no report for approximately 5 months after our "Compensatory Supplement to Brief," the last relevant filing, and that the photoing completely ignored even the CEA's February 10, 1971 reply brief, which shifted several positions which had been taken in the photoed October 13, 1970 brief. It is difficult to conceive of how a more cavalier abdication of the referee's function could be made.

I respectfully suggest to the Court that the referee's leaving such a myriad of substantive issues unnoticed and unrecognized is not only in direct and overt violation of Sec. 0.2(n) of the Commodity Exchange Act, which, we repeat, reads as follows:

> "The term "referee's report" (presiding officers report) means the referee's report to the Secretary and includes the referees proposed (1) findings of fact and conclusions *with respect to all material issues of fact,*

law or discretion, as well as the reasons or basis therefore, (2) *order, and* (3) *rulings on findings, conclusions and orders submitted by the parties.*" (underlining supplied)

—but also renders the referee's report a legally null and void document which should be expunged from CEA Docket No. 167.

* * *

"O"

Substantive Issues of Willfullness and Due Process

I respectfully suggest to the Court that the issues of willfullness and due process which pervade the entire structure of events and acts in CEA Docket No. 167, but which have been effectively buried and not allowed to surface by the unbalanced judicial process of the CEA, are key elements of constitutional law in the CEA conspiratorial acts against me and my company.

Under specific procedural rules of the Commodity Exchange Act, the CEA is not permitted, except in cases of willfullness or in which the public interest or safety otherwise requires, to institute proceedings against a registrant unless the facts or conditions which may warrant such action are first called, in writing, to the attention of the person in order to allow such person an opportunity to achieve compliance with the law.

In the Commodity Exchange Act, this specific procedural rule is under subsection (c) of Sec. 0.3, Institution of Proceedings. Rule 0.3(c) reads, in part, as follows:

* * *

"(If) . . . the Secretary has reason to believe that any person . . . is violating or has violated any provision of the Act or any of the rules and regulations . . . he will institute a proceeding: *Provided,* that in any case, except one of willfulness or one in which the public health, interest or safety otherwise requires, prior to the institution of a proceeding for the suspension or revocation of a registration or license, facts or conditions which may warrant such action shall be called in writing, to the attention of the person complained against, *and such person shall be accorded opportunity*

to achieve compliance with all lawful requirements." (underlining supplied.)

* * *

Yet, by the simple expedient of including the word "willfully" in their complaint against me in CEA Docket No. 167—*and without offering proof or determination of willfullness at the hearing,* and by ignoring all testimony and briefs submitted by us to show conclusively that I had not acted willfully—the CEA was able to circumvent the need to follow the required strict procedure of due notice of actual or possible violating of rules as explicitly required by Rule 0.3(c) of the Commodity Exchange Act. In thus abrogating due process of law, the CEA violated my Constitutional rights.

As already mentioned in Sec. "L" supra, I was not permitted argument at the August, 1970 hearing on the issue of willfullness, and was told by the referee that the issue should properly be argued in the form of a brief to be submitted to him after the hearing. Our brief on the issue of willfullness was submitted in December, 1970 and covered the subject in extenso. Yet, it has been completely ignored by the judicial process of the CEA.

At the hearing in August, 1970, I gave extensive testimony and evidence that I not only had not willfully violated the rules of the CEA, but, on the contrary, had offered to take any and all steps they might suggest to assure compliance with the new regulations—this testimony and evidence has remained unchallenged and unrefuted by the CEA. At the same time, the CEA has chosen to completely ignore the plethora of evidence, both legal and factual, already on the record of CEA Docket No. 167, to clearly and logically support our position that we did not willfully, or in any manner, violate the Commodity Exchange Act, as alleged.

I respectfully submit to the Court that this ploy or stratagem on the part of the CEA—that is, by simply inserting the word "willfull" into the complaint against me in order to circumvent Rule 0.3(c)—is not only a violation of my Constitutional rights but also clear indication of the conspiratorial aspects of the acts of CEA officials and personnel in CEA Docket No. 167.

This is a particularly heinous act on the part of the CEA conspirators—for, by such a simple ploy of inserting a single

word in a complaint—they were able to by-pass and negate the wholesome intent of Rule 0.3(c), which is based on the due process concept of our Constitution. Such a rule also is structured firmly into the Administrative Procedure Act —specifically, Section 9(b). For the CEA to take such liberties with the rules are part and parcel of the due process concept entrenched in our Constitution to further an illegal scheme completely unrelated to their duties and functions under the Commodity Exchange Act must be considered, I respectfully submit to the Court, a criminal activity.

Normally and customarily, the CEA is meticulous about observing the letter and spirit of Rule 0.3(c) of the Commodity Exchange Act. From my own experience as a registered commission merchant with the CEA, I customarily expected cooperation from them in *always* supplying proper notice and information of any irregularity in our accounting system and any possible infraction of the rules. I learned to expect such proper notice in the form of a post-audit meeting with auditors and also from notice in writing.

Over and above my personal experience pertaining to customary notice and communications from the CEA it must also be considered that the practice of giving due notice pertaining to infractions or violations is generally customary practice on the part of the CEA, in accordance with Rule 0.3(c).

The following excerpts from the DECISIONS and ORDERS public record files of the CEA offer substantive evidence of the diligence with which the CEA adheres to the requirements of Rule 0.3(c), in calling violations and irregularities to the attention of registrants and affording them an opportunity to bring themselves into compliance and also evidence that such CEA procedure is customary even in cases of flagrant violations of the law and rules and where the public safety and interest may be at stake:

CEA Docket No. 153, Decision and Order, issued by the agency on May 2, 1968, states in part:

> "4. Examination of the respondent's records by the Commodity Exchange Authority as of December 30, 1966, disclosed that on 30 business days between April 29 and July 7, 1966, both inclusive, the respondent was undersegregated in amounts within the range of $49 and $2,101. On February 9, 1967, the Director of the

Accounting and Licensing Division of the Commodity Exchange Authority wrote a letter to the respondent as follows:

'The Commodity Exchange Authority audits the records of firms operating as futures commission merchants. The audits are made to determine compliance with the provisions of the Commodity Exchange Act and related regulations. This letter concerns the audit made of your records as of December 30, 1966.

This law, as you know, regulates futures trading in commodities mentioned in section 2. Section 4d(2) provides standards for handling regulated customer's accounts. With reference to the money, securities, and property received from or accruing to such customers, it provides:

1. They shall be treated as belonging to the customer depositing them.
2. They shall be separately accounted for and not be commingled with those of the commission merchant.
3. They shall not be used to margin the trades of any person except the one for whom held.

This requires that money or property held for customers shall be placed in segregated accounts. The money or property held in such accounts must be sufficient to pay amounts due customers.

Sections 1.23 and 1.32 of the regulations provide for a record of segregated condition. Your records show many failures to keep sufficient funds in segregated accounts. They show under-segregation in thirty business days in the period beginning April 29 through July 7, 1966. The amounts of under-segregation range from $49 to $2,101.

Our representative told you that this under-segregation was a serious failure to comply with the law. This letter is to confirm the audit findings as discussed by our accountant. Also, we wish to afford you an opportunity to achieve compliance.''

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CEA Docket No. 155, Decision and Order, issued by the agency on September 20, 1968, states in part:

"b. Subsequent to the entry of the order in the above-mentioned proceeding and prior to the acts and omissions described in Finding of Fact 3 above, the Commodity Exchange Authority examined the records of the respondent corporation as of June 28, 1957, December 30, 1960, and April 30, 1962, and on each such occasion notified respondent A. H. Myers that the examination had disclosed that the respondent corporation was in an under-segregated condition and discussed the matter with him."

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CEA Docket No. 157, Decision and Order, issued by the agency on January 10, 1969, states in part:

"(4) Prior to the acts and omissions described in paragraph 3 above, examination of the records of the corporation by the Commodity Exchange Authority as of May 31, 1968, revealed that the firm was in an under-segregated condition on various dates in May 1968. On July 9, 1968, the Director of the Authority's Accounting and Licensing Division wrote a letter to respondent James B. Pepper in his capacity as vice-president of the respondent corporation, calling attention to the under-segregated condition of the firm revealed by the Authority's examination of its records as of May 31, 1968, informing him of the requirements of the Commodity Exchange Act relating to the treatment and handling of customers' funds, and affording the firm an opportunity to bring itself into compliance."

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CEA Docket No. 158, Decision and Order, issued by the agency on February 27, 1969, states in part:

"(5) In June 1966, and prior to the acts and omissions described above, examination of the books and records of respondent Sterling Securities, Inc. by the Commodity Exchange Authority disclosed that 11 business days during the period from May 25, 1966 through June 9, 1966, respondent Sterling Securities, Inc. was under-segregated in amounts with the range of $185.25 and $3,111.50, and that 47 business days during the period from April 4, 1966 through June 8, 1966, respondent

Sterling Securities, Inc. had not prepared a daily record of customers' funds required to be held in segregation. These matters were discussed with respondent Paul J. Miller, and on June 23, 1966, the Director of the Accounting and Licensing Division of the Commodity Exchange Authority wrote a letter to respondent Paul J. Miller in his capacity as an officer of the respondent corporation, which letter read as follows:

'A basic purpose of the Commodity Exchange Act is, as you know, to insure that regulated commodity customers' funds are separately accounted for and not used by the commission merchant to finance his own operation, nor may he use one customer's funds to finance the trading of another. In order for the commission merchant and our auditors to determine compliance with these requirements, Section 1.32 of the regulations under the law provides that, as of the close of the market each business day, a computation shall be made of the amount of money, securities, and property which must be placed in segregated accounts to meet the requirements of the act.

On May 10, 1966, your officers discussed the segregation and recordkeeping provisions of the regulations with Mr. G. Edward Piala of our Chicago office. Also, we sent you a leaflet on segregation and accounting procedures when you were registered as a futures commission merchant. For these reasons your responsibilities under the act were known by your management.

Our recent audit disclosed that you were under-segregated in the amount of $2,900.00 on the audit date, May 31, 1966. Also, you were under-segregated on ten other business days from May 25, 1966 through June 9, 1966. Further, you failed to prepare the daily computation of segregation requirements on 47 business days during the period of April 4, 1966 through June 8, 1966.

The purpose of this letter is to inform you that these failures to observe the provisions of the law and regulations are serious and to afford you an opportunity to bring your firm into compliance."

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CEA Docket No. 159, Decision and Order, issued by the agency on March 2, 1970, states in part:

> "As of December 10, 1963, The Siegel Trading Co., Inc., had failed to compute and keep a record as of the close of the market on each of 23 business days from November 5 through December 9, 1963, showing the amount of money, security, and property owing or accruing to its customers in order to comply with the requirements of section 4d(2) of the Commodity Exchange Act. Previous failures to compute and keep such records were discussed with Joseph E. Siegel and Alvin C. Winograd by CEA accountants at various times, and continuing failures were called to the attention of Joseph E. Siegel and The Siegel Trading Co., Inc. by the Act Administrator in a letter dated October 18, 1963."

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CEA Docket No. 166, Decision and Order, issued by the agency on June 12, 1970, states in part:

> "(6) Between June 25, 1968 and August 14, 1969, the Commodity Exchange Authority found it necessary to communicate with the respondent on numerous occasions because of his failure to transmit reports. On September 24, 1969, the Administrator of the Commodity Exchange Authority addressed a letter to the respondent calling attention to his delinquencies in submitting reports, and advising the respondent that he should file all required reports on or before October 10, 1969, and warning him that continued failure to file such reports could result in the institution of administrative proceedings directed toward the denial of trading privileges on all contract markets. Notwithstanding such letter, no reports were filed. In the circumstances, the respondent was aware of his obligations under the Commodity Exchange Act and regulations with respect to the filing of reports."

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CEA Docket No. 171, Decision and Order, issued by the agency on June 16, 1970, states in part:

> "5. During the period from August 1 through September 30, 1969, the respondent corporation failed to prepare and maintain a monthly computation of its net worth, as required by section 1.10 of the regulations issued under the Commodity Exchange Act (34 F. R. 599). Prior to September 30, 1969, examination of the books and records of Roberts, Lane & Co., a predecessor firm to the corporate respondent, by the Commodity Exchange Authority as of March 28, 1969, disclosed that the said firm was not preparing and maintaining such a computation and this failure was called to the attention of the firm in writing on August 20, 1969, and to the attention of respondent George C. Lane in a letter dated August 25, 1969."

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CEA Docket No. 172, Decision and Order, issued by the agency on September 16, 1970, states in part:

> "5. On numerous occasions dating as far back as March 18, 1969, and continuing up to January 23, 1970, officials of the Commodity Exchange Authority not only informed the respondent of the reporting requirements under the Commodity Exchange Act and regulations with respect to live cattle futures, but also found it necessary to communicate with the respondent in writing directing attention to the respondent's failure to file required reports . . ."

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CEA Docket No. 178, Decision and Order, issued by the agency on August 25, 1971, states in part:

> "(b) During the period between June 5 and June 11, 1970, both inclusive, the respondent corporation was continuously under-segregated in amounts ranging from $137,014 on June 10, 1970, to $260,134 on June 11, 1970, that is, throughout the period mentioned the total amount of customers' funds held in segregation as above described, was from $137,014 to $260,134 less than the amount necessary to pay all credits and equities due to each customer.
>
> (c) Under the regulations issued pursuant to the Commodity Exchange Act the respondent corporation was obligated at all times material herein to prepare and maintain a daily computation and record setting forth

the amount of money, securities and property of its customers required to be held, and held, in segregated accounts in accordance with the requirements of section 4d(2) of the Commodity Exchange Act (7 U.S.C. 6d(2)). On numerous days during the period between August 13 and December 31, 1970, both inclusive, the daily computation and record that was prepared and kept by the respondent corporation to meet the requirements of the regulations contained errors which resulted in gross misstatements of the amount of customers' money, securities and property held in segregation.

3. Examination of the records of respondent Dean Witter & Co., Incorporated, by the Commodity Exchange Authority as of November 30, 1968, and examination of the records of Dean Witter & Co., the respondent corporation's predecessor partnership, as of March 31, 1966 and February 27, 1967, disclosed that the corporation and its predecessor partnership had not satisfactorily complied with the requirements of the Commodity Exchange Act and the regulations thereunder relating to the handling of customers' funds and to the preparation and maintenance of records in connection thereto. These matters were called to the attention of the corporation and to its predecessor partnership in writing by T. Reed McMinn, Director of the Commodity Exchange Authority's Eastern Region, on July 18, 1966, May 2, 1967 and April 24, 1969.

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CEA Docket No. 179, Decision and Order, issued by the agency on October 29, 1971, states in part:

4. Having reason to believe that the respondent corporation was not meeting the minimum financial requirements prescribed in section 1.17 of the regulations under the Commodity Exchange Act, T. Reed McMinn, Director of the Commodity Exchange Authority's Eastern Region, on January 20, 1970, warned the corporation in writing as follows: "It is your firm's responsibility at all times to meet the financial requirements. . ." prescribed in section 1.17. To correct the working capital insufficiency at the time, respondent Fullerton on or about February 13, 1970, loaned the

corporate respondent $100,000 and subordinated the loan to the claims of the other general creditors.

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CEA Docket No. 182, Decision and Order, issued by the agency on November 1, 1971, states in part:

7. On numerous occasions dating as far back as 1953 and continuing up to April, 1967, officials of the Commodity Exchange Authority not only informed the respondent of his responsibilities under the Commodity Exchange Act and regulations with respect to speculative trading and position limits and reporting requirements, but also found it necessary to communicate with the respondent in writing directing attention to his failure to observe such limits and file the required reports.

• • •

The above cited cases indicate the great care which the CEA normally employs in observing the due process concept that is explicitly set forth in Section 0.3(c) of the CEA rules and regulations. I respectfully point out to the Court that in all of the above cited cases, actual violations of the rules had occurred, and in some instances, the violations were flagrant and represented serious operational deficiencies which posed a real threat to the public safety and interest. Yet, the CEA was extremely careful to afford the violators, through notice, verbally and in writing, the opportunity to bring themselves into compliance.

In one of the above cited instances, the deficiency in operational capital was $100,000.00—yet the organization was allowed the opportunity to bring itself into compliance, through proper oral and written notice.

In our case, however, we were never even notified that we might be in possible violation of Rule 1.17—all we knew was that the CEA auditor, Fitzpatrick, and I had heated arguments as to the proper documentation of our assets and that some form of determination or guideline would be forthcoming from Washington, should any changes be required. In the absence of such determination or guidelines from Washington and the lack of a specific post-audit report from Fitzpatrick to the contrary, we rightfully assumed that our assets were acceptable—otherwise we would have been told.

In order that the Court may fully appreciate the general

and specific facts that we have set forth in CEA Docket No. 167 to support our position that we did not act willfully, I set forth below said facts in our defense and call to the attention of the Court that these facts have not been contested or disputed at any time by the CEA, itself:

A) We were not told at any time after the April/May Fitzpatrick audit that our documentation of the assets was such as to render our assets invalid under the new rules.

B) There were numerous heated arguments between Fitzpatrick and me, and I was told that the issues were being referred to Washington for analysis and determination and that I would be informed about the result.

C) I repeatedly told Fitzpatrick to simply let me know what was decided by the CEA and I would personally advance cash, if necessary, to convert any disputed assets into liquid form.

D) I repeatedly told the CEA that there was no need to wrangle over any of the assets—for we had decided to terminate our Supervised Trading Programs and could readily reclassify into Section 1.31a, which has no minimum financial requirements for its registrants.

E) Our situation posed no danger or threat in any form to the public. We had a perfect record of integrity over the year of handling customers' funds. We even had a perfect record in the handling of about 400 customers' accounts from 1960 through 1969 which were non-regulated, were not subject to CEA rules, and which funds were commingled with our own corporate funds, as is customary and legal in the handling of non-regulated accounts.

F) Rule 1.17 pertaining to minimum financial requirements was brand-new, in effect only a few weeks. Even the CEA itself had difficulty in interpreting it. McMinn, the New York CEA regional administrator told me, and I so testified at the hearing, that the CEA itself had to ask the help of the American Association of Certified Public Accountants in interpreting the rules.

G) Fitzpatrick, at the conclusion of the April/May audit, did not hold a post-audit interview or meeting with me, which is customary practice and procedure, to enlighten me as to the latest interpretation or determination from Washington. He simply left these various questions "in the air."

H) A number of times, in the attempt to put an end to

the Fitzpatrick harassment and vituperation, I said, "For heaven's sake, just tell me what you want me to do and I will do it!"

In light of the foregoing, a number of conclusions may be drawn, I respectfully submit.

First, we did not willfully violate any rule of the CEA.

Secondly, we were not afforded customary due notice regarding any possible or actual violation, such due notice being our Constitutional right and explicitly spelled out under Sec. 0.3(c) of the CEA rules.

Thirdly, in not being afforded due notice, such as is customarily given freely and repeatedly, as cited from the CEA public record in the earlier portion of this Section, I have clearly been discriminated against. Such discrimination by the CEA, in not offering me the same consideration given to even the most flagrant violators of the rules, is a violation of still another of my Constitutional rights—that of equal treatment under the law.

I should like to mention that the cases I have cited in this Section all involve firms which were afforded proper due notice but failed to bring themselves into compliance, thus necessitating a CEA complaint against them. I asked the CEA national administrator how many firms and individuals during the past five years *had responded to due notice of possible or actual violations by bringing themselves into compliance.* I was told that I could not have that information, as it would be a *massive undertaking* to research it. (underlining mine)

I should also like to call to the Court's attention an additional issues of law pertaining to willfullness which is interwoven in CEA Docket No. 167. It is as follows:

The CEA amended complaint, issued in June, 1970, was issued under Section 6(b) of the Commodity Exchange Act, the applicable part of which states that the Secretary of Agriculture may issue a complaint if he has reason to believe that a person had willfully made any false or misleading statement of a *material fact* in any registration application or any report filed with the Secretary . . . "(underlining supplied).

I respectfully submit to the Court, in light of the facts A), B), C), D), E), F), G), and H) set forth above, I most assuredly did not willfully make any false or misleading

statements of *material fact* in any registration application or any report filed with the Secretary, as nominalistically alleged by the CEA.

Significantly, I should like to point out to the Court, the CEA made no attempt at the hearing or in its brief to set forth any facts that would prove that I had willfully made any false or misleading statement of *material fact* in our registration application and reports filed with the Secretary.

There are other ramifications of the issue of willfullness which emerge upon close study of the record to date of CEA Docket No. 167, to which, I respectfully submit, the Court may wish to attend, from the standpoint of law. The first of these ramifications is the fact that the CEA made no attempt in its pleadings or at the hearing, or in its two briefs filed subsequent to the hearing, to offer evidence or proof of any kind that I acted willfully. It simply alleges that I so acted, then is content to play around with definitions. In the definition game, the referee also plays a part—actually he zeroes in with two definitions—one relatively simple, which he ties to the Administrative Procedure Act, and which he gave at the hearing, the other an incomplete and distorted version of a Supreme Court ruling on the issue of willfullness. This latter definition is derived directly from the CEA prosecution's brief, which the referee photo-copied and presented as "his" "referee's report."

The referee's initial definition of willfullness was given at the hearing as being "what the Administrative Procedure Act says it means . . . something done deliberately . . ." At the hearing, significantly, the CEA prosecuting attorney offered no comment of his own, even though early in the hearing he had stated that the government would go into the matter of willfullness, but he did not follow through on his promise.

The CEA prosecuting attorney's brief filed in October, 1970, touched upon the subject with a few general remarks, plus an incomplete and extremely misleading quotation from a Supreme Court decision. In my brief, filed in December, 1970, I called attention to this misleading quotation and developed the subject in extenso in a section of my own brief which was devoted to the subject of willfullness.

In the CEA prosecuting attorney's reply brief filed in February, 1971, he makes no attempt whatever to refute my analysis of willfullness, makes no attempt to defend, or

repair, his demolished position with reference to his incomplete and misleading Supreme Court excerpt. Instead, he replaces the Supreme Court with two "authorities" on the subject—none other than the CEA's very own referee and the CEA's judicial officer. These two "authorities" have a common definition for "willfullness." It means "anything done deliberately, irrespective of motive or intent."

Simply spewing allegations of willfullness and various definitions of willfullness, irrespective of whether the definitions are sound or unsound, complete or incomplete, valid or invalid, does not constitute proof that I acted willfully in any way.

As stated elsewhere in this and other sections of this affidavit, by the simple expedient of inserting the word "willfully" into the life stream of CEA Docket No. 167, the CEA was able to proceed with its plan of abrogating the need for due notice to me, as explicitly required by Section 0.3(c) of their rules, and, more importantly, as required by the due process concept in our nation's laws and, above all, in our Constitution.

May I ask the Court whether such procedure—the abrogation of the broad and substantive concept of due process of law by the simple expediency of inserting a simple word, "willfull," into a complaint, without substantiation, was intended by Congress to be used as a standard mode of procedure by an administrative agency; whether, indeed, an agency thus acting has not transcended its area of duty and legal scope and purpose altogether?

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"P"

Extensive Pattern of CEA Falsifications

One of the pillars of our defense in CEA Docket No. 167, which, owing to the monolithic structure and modus operandi of the CEA assault, I have been unable to surface on the record, is as follows: *Only,* through illegal and surreptitious acts, misrepresentations and falsifications has the CEA been able to structure the CEA Docket No. 167 record in such a manner as to make it appear that we have violated their rules. *Only* by breaking the law, by falsifying facts and figures, by manufacturing "evidence," by depriving me of due process of law and by violating my Constitutional

rights has the CEA been able to structure its "case." In simple and basic terms, this was a "frame up," an organized effort to "railroad" me and The American Board of Trade to oblivion.

It is our position, too, that if the CEA had acted as they should have, and are required by law to act, in a responsible, straightforward, lawful manner, it would have been impossible for them to have found us wanting in any manner—financially or morally—and most assuredly not wanting in our financial responsibility to our customers.

If the CEA had acted in a normal manner vis-a-vis me and my companies—rather than in a manner reminiscent of the Gestapo methods of the 1930s—the groundwork could not possibly have been laid for a complaint against us. If, in normal procedure and straightforward manner, they had outlined the requirements of their brand-new Rule 1.17, I would have responded promptly and constructively. I have always been fully cooperative in my relationship with the CEA and other government agencies. If they had as much as expressed an iota of interest in solving the "problem" of the documentation of the assets, the "problem" would have no longer existed.

The CEA represents an administrative arm of our government and, like all other agencies, is provided with the required and necessary "tools" of law and personnel with which to accomplish their lawful purposes. They have the tools, in other words, with which to carry on their function in a normal, constructive manner. It is not necessary, or desirable, or legal for an agency to lie, to cheat, to falsify records, to mislead, to "frame" a victim, to make use of "hatchet men," in the form of auditors who "find" or "do not find," or actually manufacture "evidence," in accordance with the requirements of the "job" at hand.

However, the CEA objective in CEA Docket No. 167 was not to ascertain the truths regarding the documentation of our assets, but rather to engineer the downfall of one of their critics and also to vitiate, and, if possible, destroy, a new exchange and marketplace.

The following is a list of specific falsifications, lies, distortions and illegal acts which the CEA officials and personnel committed in their organized conspiracy to destroy me and, through me, The American Board of Trade. The following, singly and collectively, represent illegal acts on

the part of CEA officials and personnel which were in violation of my basic rights as a citizen and in violation of all normal standards of ethics and morality.

1) Clement Gross, CEA auditor, surreptitiously falsified facts and figures on our books and records in the interest of the conspiracy.

2) Clement Gross, CEA auditor, lied under oath, as a CEA witness at the hearing in August, 1970.

3) CEA officials induced and approved the Gross falsification of our financial records.

4) CEA officials incorporated the falsified Gross figures in the amended complaint, which, in turn showed a false picture of financial deterioration in my company.

5) Gross and Kirchhoff, deputy director of the CEA, under oath at the hearing, and Bain, referee, in his "referee's report" all lied in stating that the reserve account on our books, manipulated and falsified by Gross into an account payable, met the definition of a current liability in Section 1.17(d)(3) of the regulations under the Commodity Exchange Act.

6) The referee's recommendation in his August, 1971 "referee's report" that the registration of Arthur N. Economou & Co., Inc., as a futures commission merchant be suspended for 90 days is a falsification of the record. Said sanction could not be imposed, in that we resigned as commission merchant in December, 1970.

7) The referee's recommendation in his August, 1971 "referee's report" that I and Arthur N. Economou & Co., Inc. be denied all trading privileges on all markets subject to CEA rules for a period of 90 days is a falsification of the record of CEA Docket No. 167. He knew that I ceased trading in CEA-supervised markets in October, 1969 and resigned as commission merchant under the CEA in December, 1970—in protest and disapproval of the manner in which the CEA allows trading to be conducted on the exchanges.

8) The referee falsified the record in CEA Docket No. 167 by allowing an incomplete and misleading quotation to be presented in his "referee's report" of August, 1971. The misquotation, and the misleading implications of the quotation, appeared in the CEA prosecution brief of October, 1970 and was called to the referee's attention in our brief of December, 1970.

9) Fitzpatrick, CEA auditor, lied under oath, when

testifying as a CEA witness at the hearing in August, 1970.

10) Fitzpatrick falsified the record when he testified at the hearing in August, 1970 that his April/May, 1969 audit was for the purpose of determining the "validity" of our assets. The purpose of his audit, by direction of his superiors, was to lay the groundwork for a subsequent "determination" that the assets were not valid, irrespective of the facts.

11) The allegation by the CEA that I acted "willfully" is a deliberate falsification in CEA Docket No. 167, as more fully set forth under Section "O"—"Substantive Issues of Willfullness and Due Process"—in this affidavit.

12) CEA officials at three group meetings in the CEA national administrator's office deliberately and cogently referred to The American Board of Trade as a "bucket shop"—a falsification of the operational features of this new exchange and marketplace.

13) The CEA national administrator, in a letter to me, stated that the purpose of my three 1970 visits to his office was to discuss registration of The American Board of Trade under the Commodity Exchange Act. This is a lie on the part of the CEA national administrator.

14) In his reply brief of February, 1971, Davis, the CEA prosecution attorney, misrepresented the facts relative to two post-audit interviews conducted by CEA auditors. In addition, he also manufactured a non-existent post-audit Fitzpatrick interview.

15) Assistant secretary of agriculture, Lyng, told what is, at best, a half-truth by stating in a letter to me that the Secretary of Agriculture could not make rulings to encompass the innovative features of the new exchange when, in fact, Congress had specifically empowered the Secretary of Agriculture to make rules to implement the objectives of the Act.

16) The CEA hierarchy conveyed fabricated, distorted and untrue information to the U. S. Securities and Exchange Commission in late-1969/early-1970, to induce the SEC to institute injunctive proceedings against the Precious Metals Syndicate.

17) The CEA hierarchy conveyed fabricated, distorted and untrue information to the U. S. Securities and Exchange Commission in late-1970/early-1971 relative to The

American Board of Trade, to induce the SEC to adopt a position of animus and suspicion toward the new exchange.

18) CEA prosecuting attorney Davis, in his October, 1970 brief, and referee Bain, in his "referee's report," falsified the CEA Docket No. 167 record by setting forth a personal attack on my character and my personal and financial integrity, which is contradicted by all the acknowledged facts—whereas . . .

19) at the August, 1970 hearing, Davis specifically stated that the government would not contest my impeccable and exemplary business background that I had placed on the record in my pleadings prior to and at the hearing, which statement by Davis was proved by his attack on me in his brief to be a lie.

20) The CEA national administrator lied to persons who inquired about the ABT, when he answered such inquiries by mailing a copy of the amended complaint, representing the complaint as "all we have on file," when, at the time, the CEA office also had on file our Answer to the complaint denying the allegations, copies of our petition to the Secretary of Agriculture, our briefs setting forth our defense, and our record of impeccable business conduct under their jurisdiction.

21) The CEA procedure of mailing only copies of the complaint or amended complaint to interested persons who inquired about the ABT, without also mailing copies of our Answer on file denying the allegations and setting forth our defense, is a falsification of the record of CEA Docket No. 167.

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"Q"

Substantial Damage Inflicted
Upon me by the CEA

The CEA, through the framework of the complaint procedure in CEA Docket No. 167, and its conspiratorial acts attendant thereto, has inflicted heavy and cruel damage upon me these past two years, physically, financially, and mentally.

My business record of 17 years of impeccable and unblemished business dealings with thousands of persons in the financial world has now been undeservedly blackened by

the CEA action—in effect, negating my reputation for honesty, integrity and soundness of business character that I so carefully cultivated throughout the years.

The CEA blow was particularly vicious in its effects upon me, in that it was timed by the CEA to fall at a critical juncture in my career, whereby I had phased out from the CEA-regulated activities of my Supervised Trading Programs and had started to phase into new activities encompassing The American Board of Trade, the Trading Syndicates and The Economou Financial & Development Corp. I relied heavily upon my years of constructive and unblemished relationship with the financial community to attract the thousands of investors and the millions of dollars in equity financing participation in the various enterprises and trading syndicates that I launched into reality in 1968 and 1969.

The physical and mental effort required to hold the CEA monolithic juggernaught at bay required many hundreds of hours of my time—thus depriving my enterprises of these same hundreds of hours of concentrated effort which would bring to them the creative attention they sorely needed in their formative stages.

The damage which the CEA inflicted upon me was particularly vicious in that the black cloud that engulfed me was continually reinforced through the acts of the CEA. The timing of the amended complaint by the CEA to coincide with the announcement of our $300,000.00 EF&D stock issue is an example at point. The mailing of the complaint and amended complaint to interested persons and credit agencies, without also mailing copies of our answer, is still another example of effective anti-Economou devices used by the CEA. The "bucket shop" label, applied verbally to the ABT at group meetings in the national administrator's office, was transformed into anti-Economou and anti-ABT rumors in the financial field. One of our ABT customers phoned frantically to find out if it was true that "Mr. Economou has been indicted by the CEA in Chicago"—a wild rumor that apparently had been passed on to him by one of the customers' men of a brokerage house.

The black cloud that the CEA cast over me, through its conspiratorial acts, has permeated and adversely affected my relationship with four basic areas of the financial field:

1) *The investing and trading public,* which is subject to rumors and erroneous subjective value judgments as to our financial standing and has shown hesitancy and timidity at best, and outright hostility at worst, with regard to entering into business relationships with my various organizations, particularly The American Board of Trade.

2) *The financial community* has expressed broad interest in the unique conceptual and operational features of The American Board of Trade, yet refuses to participate actively while the cloud of a government action hangs over us. To date, we have received over 900 requests for information regarding memberships on the ABT, yet only 5 memberships have been sold. We have received numerous cancellations of membership applications, after they were submitted, because prospective members invariably discuss their plans with others and soon learn of the CEA action against us.

3) *The financial press* has been negatively influenced because of our "legal" problems with the CEA. The press has acted in a cool manner, non-receptive to any explanations that I have tried to offer. We have been pointedly ignored.

4) *The U. S. Securities and Exchange Commission* has been improperly and negatively influenced into an attitude of animus against the ABT by direct and indirect acts of the CEA. Thus the CEA has adversely affected our relationships with the SEC and completely blocked our plans to register under the Securities Exchange Act of 1934 which adversely affected membership sales.

The CEA Docket No. 167 has caused substantial damage to each of the organizations which I created and launched in recent years. More specifically:

A) The American Board of Trade exchange and marketplace complex has been completely stymied in attracting members and developing sales of its broker/dealer franchises; it has been stymied in its plans for the development of a broad sales program; and it has been stymied in its plans for public equity financing. Only through the dint of determined, unrelenting day-and-night effort on my part and on the part of Mrs. Economou, who has been working side by side with me, have I been able to get the ABT off the ground these past two years and maintain its viability.

B) My two Trading Syndicates upon which I had planned for income and revenue after I had relinquished my Super-

vised Trading Programs in July, 1969, have not fulfilled their role in our plans. One is alive, but not fulfilling expectation; the second has been unable to get off the ground.

C) Arthur N. Economou & Co., Inc., which had been expected to contribute substantially to our financial income and revenues in its role as broker for the two Trading Syndicates, has been unable to contribute as planned to our cash flow and our financial picture, owing to the inactivity of the two Trading Syndicates.

D) The Economou Financial & Development Corp. similarly has been affected by the CEA action. It too, has been unable to attract a public following and the sale of its stock issue quickly came to an end, for the issuance of the CEA amended complaint in June, 1970 was timed by the CEA to coincide with the announcement of the EF&D stock issue in the amount of $300,000.00 which was intended to provide the "seed money" to launc hthe initial developmental stages of the ABT complex.

E) The American Board of Trade and I have lost our substantial competitive advantage in the exchange community. The unique conceptual and operational features of the ABT, which formed a basis for our direct competitive challenge to the present commodity and securities exchanges, are being openly proposed by these same exchanges and other segments of the financial community. Meantime, The American Board of Trade and I sit on the sidelines unable to participate in the changing scene, whereas we should rightfully be active and instrumental in leading the way. The various exchanges are reinforcing their positions at three high-level hearings and studies currently underway in Washington devoted to the problems of our nation's exchanges and the securities industry. These hearings and studies are being conducted by Senator Williams, Representative Moss, and Mr. Casey of the U. S. Securities and Exchange Commission. Spokesmen for the community and private citizens have testified at these hearings, each, in effect, opting for constructive change and presenting their ideas in detail at the hearings. I, on the other hand, remain on the sidelines in "disgrace," for I do not wish to embarrass the Chairmen of these hearings and myself by bringing my plight to their attention.

Thus we've been left far behind by a community that for the first time in its history is making efforts to restructure

itself constructively and, in so doing, adopting several of our concepts and strengthening the weak elements in their conceptual and operational patterns. The American Board of Trade and I, however, are unable to aggressively implement even our most basic measures—in fact, I have found that it is difficult to even communicate with the financial public and community, for none wishes to get involved with a new exchange that is enveloped within a complaint procedure with a government agency, irrespective of who is right or who is wrong.

F) Owing to the burden of extra work that I was forced to undertake to combat the CEA assault these past two years, and to the decrease in personal efficiency attendant thereto, I have been unable to function effectively in my roles as president of The American Association of Commodity Traders and as editor of the "Commodity Journal." As a result, the affairs of the Association have suffered from the lack of sufficient and proper attention. There have been no seminars or meetings of the Association held during 1970 and 1971; and in each of these years, only four issues of the "Commodity Journal" have been published, instead of the usual 6 bi-monthly issues per year. The inefficiency of the management of the Association has become apparent to members, complaints and resignations have been forthcoming, and such state of affairs, which I have been unable to remedy, has resulted in loss of reputation and prestige and has been a source of great mental anguish to me.

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Judicial Officer Now
Joins the Conspiracy

On November 4, 1971, I filed our exceptions to the referee's report and at the same time requested oral argument before the Secretary and declared intention to file briefs in addition to oral argument, as is our right under Section 0.19 of the rules and regulations of the Commodity Exchange Act, which reads as follows:

• • •

Section 0.19 Argument before Secretary

(a) Oral argument. Unless a party has included in his exceptions a request for oral argument or has filed

a separate request for oral argument prior to the expiration of the last date for filing such exceptions, he shall be deemed to have waived his right to such oral argument.

(b) Briefs. The parties may file written briefs either in addition to oral argument or in lieu thereof.

(c) Scope of argument. Except where the Secretary determines that argument on additional issues would be helpful, argument, whether oral or on brief, shall be limited to the issues raised by the exceptions and statement of objections. If the Secretary determines that additional issues should be argued, counsel for the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate argument on all the issues to be argued."

* * *

The Secretary of Agriculture is represented at this juncture of the CEA Docket No. 167 by the judicial officer of the U. S. Department of Agriculture. He has received the so-called "referee's report," and now that we have filed exceptions to the photo-copies of the prosecution's brief, which the referee submitted as "his report," the judicial officer is to evaluate our exceptions, hear oral argument thereon and appraise the briefs which we have advised we will file.

After filing of our exceptions to the referee's report, we petitioned the Secretary of Agriculture for a 60-day moratorium, to allow me time to prepare the pleadings in the instant action for the purpose of asking the U. S. District Court for intervention and protection in CEA Docket No. 167.

On November 30, 1971, in response to my request for a 60-day moratorium, the judicial officer granted our petition, stating that oral argument would not be held prior to February 1, 1972. At the same time, the judicial officer noted that the CEA prosecuting attorney did not object to the request "since it does not appear that further prolongation of this proceeding will adversely affect third parties."

In the same communication, the judicial officer also stated: "Leave is granted to the respondents to file an additional brief on or before February 1, 1972, *** No briefs will be permitted after oral arguments unless the

Judicial officer, at the oral argument, specifically requests further briefs."

I respectfully call to the Court's attention that the only rule to govern the judicial officer's procedure with reference to the oral argument and the briefs which may be filed *in addition thereto* is under Section 0.19, as set forth above.

No aspect, explicit or implicit, of Rule 0.19 requires or suggests that we file a brief *prior to oral argument,* and we did not request an opportunity to file such a brief. This gratuitous gesture by the referee is actually a two-pronged ploy which permits him to reinforce the monolithic structure of the CEA's planned and programmed conspiracy to find Economou "guilty as charged."

Specifically, the brief that he has granted us "leave" to file, a brief that I did not request to file and for which Section 0.19 does not provide, would serve as a "working guide" for the judicial officer and the prosecution staff of the CEA to program the scheduled oral argument in such a manner as to impede and obstruct any presentation that I would make. This was the modus operandi that the referee and the CEA prosecuting attorney used at the hearing, after I had filed, as requested, a full and detailed answer to the amended complaint, to obstruct my presentations and even rule in advance as to what I would not be allowed to present as a part of my defense.

Furthermore, although it would offer the CEA monolith, through the judicial officer, a decided advantage if I were to file a detailed brief prior to oral argument, it could in no way be of benefit to my defense. I have filed voluminous briefs during the course of the CEA proceedings covering almost every conceivable aspect, yet not one issue that I filed in our defense in Docket No. 167 has received consideration. To what purpose would I file an additional brief into this judicial void? On what subject would I file an additional brief prior to oral argument?

I submit that this "invitation" to file an additional brief is simply a judicial maneuver to accomplish a two-fold purpose: 1) To elicit my planned approach to the oral argument, and 2) to deprive me of my right to file a brief *subsequent* to oral argument, as provided in Section 0.19(b) of the rules which states: "The parties may file written briefs *in addition to oral argument* or in lieu thereof." (Underlining supplied.)

The Webster unabridged dictionary defines "addition," as "The result of adding; anything added; augmentation," and the prepositional clause, "In addition to," as "over and above." One does not "add to" that which does not yet exist.

For the judicial officer to deny or restrict me the right to file meaningful briefs after, or in addition to, oral argument, as specifically provided under Rule 0.19(b), relative to our exceptions to the referee's report, but to grant me "permission" to file an unwanted, unneeded and harmful brief prior to oral argument, is a violation of my rights as a respondent in CEA Docket No. 167.

Denying us the right to file briefs in addition to oral argument, as provided in the rules, also would deny us the right to comment upon and discuss the oral argument procedure, itself. This would allow the judicial officer to do as he pleased with respect to any portion of my presentation, to structure the record as he pleased—knowing that I would not have the opportunity to subsequently file a brief setting forth my commentary on the proceeding, and rebuttal.

There is still another area of judicial interest involved relative to the forthcoming oral argument before the judicial officer, the purpose of which is for me, as respondent, to present argument pertaining to our exceptions to the "referee's report."

Such oral argument cannot be considered meaningful in any sense of the term, for, by completely ignoring the issues we raised in our defense, the referee's report becomes a meaningless document, devoid of judicial significance, in that it makes no attempt to appraise and to synthesize the issues set forth by both parties in CEA Docket No. 167. By its very nature, it has deprived us of an opportunity to offer full, meaningful oral argument before the judicial officer. The issues of fact and law *have not been processed and synthesized by the referee* for presentation to the judicial officer, and to us, in a manner that would permit meaningful oral argument pertaining to either our exceptions to the referee's report, or to the overall CEA Docket No. 167.

In effect, then, I have been denied *all* opportunity for meaningful and adequate oral argument, not only relative to our exceptions to the "referee's report," but also as

regards the overall scenario of CEA Docket No. 167, owing to 1) the referee not allowing oral argument at the hearing, and to 2) the lop-sidedness and arbitrariness of the "referee's report." Not only did the "referee's report" violate the spirit and letter of the meaning and intent of a referee's report, as set forth under Section 0.2(n) of the rules, but said "referee's report" also effectively negated the requirement of Section 0.10(f) of the rules with reference to adequate oral argument at or subsequent to the hearing. Section 0.10(f) states:

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> (f) Oral argument before referee. In disciplinary proceedings, oral argument before the referee shall be allowed unless the referee finds that the denial of such argument will not deprive the parties of an adequate opportunity for oral argument *subsequently* in the proceeding."

• • •

I was not allowed opportunity for oral argument at the hearing on any of the basic areas of our defense, including the issues of willfullness, deprivation of due process, entrapment, falsification of our records, and the pattern of maliciousness and illegal acts on the part of the CEA. Furthermore, it is now impossible for us to offer adequate oral argument on these issues, for the referee failed to synthesize and blend our pleadings, our testimony at the hearing and our briefs into his report, as specifically required by law. Thus we have been completely deprived of an opportunity for adequate oral argument in the entire proceeding. Even if we were to be heard at this juncture of CEA Docket No. 167, such opportunity for oral argument could not be deemed adequate, for the issues of fact and law presented by *both* parties have not been appraised, processed and synthesized by the referee, as required by law, *to permit adequate oral argument to be developed thereon.*

Nor can the judicial officer now properly evaluate, weigh and balance the entire record, for fruitful dialectic and synthesis of the issues of fact and law have not been developed or performed by the referee, as required by law, and as is essential if proper evaluation of the entire record is to be made.

Under these circumstances, the judicial officer has no choice but to be governed "by the record" as it stands—a

record programmed and contrived to assure that we are found "guilty as charged." The judicial officer's part in the conspiracy has thus been made relatively simple by the CEA auditors, the prosecuting attorney and the referee, who preceded him in the processing of the record for the purpose of achieving the predetermined objectives. All the judicial officer can do now is look at the programmed record and report what he sees.

What the judicial officer cannot see is the overall schematism of facts and law which constitutes our vigorous and effective defense against all the CEA allegations in CEA Docket No. 167, but which defense, owing to the conspiratorial nature of the CEA assault, was not allowed to surface on the record.

What the judicial officer cannot see is the overall sustained pattern of illegal acts committed by the CEA hierarchy and employees since April, 1969, which actually exists, but which pattern, owing to the conspiratorial nature of the CEA attack, was not allowed to surface on the record.

What the judicial officer cannot see and cannot be expected to consider and rule upon is that his fellow officers and employees of the U. S. Department of Agriculture and the Commodity Exchange Authority contrived to destroy, and succeeded in inflicting heavy damage upon, a citizen and his organizations, because said citizen has the courage not only to severely criticize the traditional exchange system, but also to propose and implement activity patterns designed to remedy the dysfunctions which are against the public interest.

That is why I am asking the Court to intervene at this juncture and assume jurisdiction of CEA Docket No. 167, for the CEA has forfeited its right and is no longer qualified, pragmatically, morally or judicially, to further appraise the issues involved in or to make any further determinations, rulings or decisions relative to CEA Docket No. 167.

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Irreparable Harm and Damage Now Impends

As set forth in Section "R"—"The Judicial Officer Now Joins the Conspiracy"—of this affidavit, the judicial officer, based on the contrived and programmed record of CEA

Docket No. 167, has no choice but to carry out the pre-determined objective of the CEA Docket No. 167, to find me "guilty as charged." Through such a "finding," the CEA will inflict irreparable damage and harm upon me and my interests in the organizations which I created and head in the commodity and financial field.

The injustice of such an inevitable decision on the part of the judicial officer is aggravated by the fact that it is based not only on an improper, unbalanced and unfair record of the issues of fact and law, but also that the CEA has forfeited its right and is no longer qualified, practically, ethically, or legally, to make any further determination, rulings or decisions relative to the CEA Docket No. 167, as more fully set forth in Section "R" of this affidavit.

The charge of underfinancing, as set forth in the amended complaint, and the "finding" of an underfinanced condition that would ensue from the judicial officer's inevitable "guilty" verdict, would represent an incorrect, unjust and highly detrimental version of the issues that the CEA contrived to structure into the complaint and the amended complaint. At worst, the issues, as contrived by the CEA, were whether or not our assets were properly documented. There has never been a question in CEA Docket No. 167 as to whether the assets were there. Yet, the charge on the public record is one of "underfinancing," with the incorrect and damaging implication that we were deficient in assets.

Still another unfair, unjustified, erroneous and highly damaging implication of the inevitable verdict of "guilty as charged" by the judicial officer would be that the public's funds had been endangered and that the public's safety and health were involved. There no longer existed an investing public to be "damaged" by any alleged improper documentation of our assets, or to be "protected" by this CEA action, as we were completing the process of closing all customers' accounts.

The investing public, however, is highly sensitive to such implications, owing to the widely publicized adverse developments among brokerage firms in recent years, in which many thousands of investors suffered monetary loss because of the deteriorated financial positions of the brokerage firms and even fraudulent operational practices on Wall Street.

Also implicit in the inevitable verdict of "guilty as

charged'' by the judicial officer would be a confirmation of the highly damaging, but falsified, figures in the CEA amended complaint which falsely indicated that our financial position as of March 31, 1970, was deteriorating at the rate of $4,000.00 per month. This one reason alone, I respectfully submit, should be sufficient to induce the Court to assume jurisdiction in CEA Docket No. 167 and prevent the irreparable harm that would be inflicted upon me if the CEA judicial officer is now allowed to publicly ''verify'' the CEA's fictitious allegations.

The allegations of the CEA, in the form of the amended complaint issued in June, 1970, incorporating CEA falsified figures, plus the continuous pressures of other illegal acts on the part of the CEA, as set forth in other Sections of this affidavit, were sufficient to inflict substantial damage upon me and my interests in the eight organizations which I created, launched and head, as more fully set forth in Section ''Q''—''Substantial Damage Inflicted Upon Me by the CEA.'' My personal reputation, which I have carefully cultivated through the years by irreproachable conduct, has also suffered serious discredit and is gravely tarnished as a result of the CEA conspiracy over these past two or more years.

Now, however, my reputation, which up until the CEA launched its unwarranted attack upon me in 1970 was unmarred and unblemished, and upon which I so greatly relied to attract the public following necessary to implement my new ventures and enterprises in the commodity and financial fields, is now threatened with complete destruction and irreparable damage if the judicial officer of the CEA is allowed to take the final step necessary to achieve this predetermined objective of the CEA conspiracy by pronouncing me ''guilty as charged.''

This unblemished business and personal reputation, which is a most precious and prized asset in the commodity and financial fields, wherein complaints, fines, sanctions, suspensions, revocations, etc., are practically a common denominator, represents the base on which I could reasonably expect to attract the following of thousands of investors who would participate with confidence in the various enterprises and activities which I created.

Yet this reputation, this sturdy platform of support for

my various enterprises, will now be ruined and destroyed by the inevitable verdict of ''guilty'' which looms directly ahead, despite the fact that I am innocent of wrongdoing in any form in relation to the rules and regulations of the CEA. Quite the contrary, the destruction of my reputation will have been brought about by a group of men in the CEA, shamefully masquerading within a framework of lies as an agency ''doing its duty,'' who deliberately set out in 1969 to bring about my downfall.

I earnestly request the Court not to allow this group of men to inflict the final death blow to my reputation which now is imminent, without first granting me the opportunity to prove my allegations in a U. S. District Court wherein I will be assured of fair and impartial consideration. I ask that I be allowed the chance to present to the Court the myriad issues of fact and law which form the overall pattern of my side of the story—the very pattern which the CEA successfully prevented me from surfacing in my defense these past two years.

Though it may be said that the judicial appellate procedure will eventually—perhaps in two or three years or more —prove my innocence, and that the verdict of ''guilty'' will be reversed, to what avail such vindication? It would serve no purpose, other than that of a splendid obituary of my career, for I will have passed from the commodity and financial scene, owing to the work of a group of men within the CEA who knew how to effectively channel the power of a government agency toward an evil end.

I again earnestly appeal to the Court not to permit the judicial officer to inflict the death blow upon my reputation.

By destroying my reputation in a single blow—a blow that may already be waiting, in the form of a photo-copy of the referee's photo-copy of the prosecuting attorney's brief—the judicial officer will also succeed in destroying my entire career, thus inflicting irreparable harm and damage upon a man who was deprived of his right to defend himself against such a devastating blow, and of the right to prove, before the blow fell, that the structure and fabric of CEA Docket No. 167 was specifically designed by the CEA to accomplish an evil predetermined objective.

I ask the Court, therefore, to grant me the right and the opportunity to present my side of the story—a basic right

that I was denied by the CEA—before my career is completely shattered and destroyed by the inevitable "finding" by the judicial officer that Economou is "guilty as charged."

If I appear to the Court to be pleading in a most urgent and vigorous manner, it is because I am intuitively impelled to make sure that my pleas will be heard in the face of the irreparable harm and damage which impends. For two years now, my pleas and my protests with respect to my basic rights as a citizen have fallen on deaf ears or have been denied by the CEA. For two years now, I have been denied or deprived of my basic rights—of due process, of freedom as to status as a registrant with the CEA, of equal opportunity to tell my side of the story to interested persons, of the right to a fair hearing, of the right to adequate oral argument, of the right, in fact, to be allowed to tell my side of the story without being bludgeoned by judicial machinations, such as the referee submitting a photo-copy of the prosecution's brief as his "report" to the judicial officer.

For two years now, in the face of heavy damage wreaked upon me and my organizations by the programmed acts of the CEA, I have managed to hold my organizations together and have been able also to nurture The American Board of Trade into viability. Through almost super-human work schedules, including many weeks in which a 14 to 18 hour work day was part of our regular life, Mrs. Economou and I were able to somehow hold our activity pattern steady, even though practically crippled in a number of basic areas. Throughout the two years, it was the stigma, the cloud, of the CEA complaint and amended complaint and the related malicious acts of the CEA, that caused the severe damage and posed such administrative and developmental problems for us. It was the power of the complaint procedure at work which crippled us, but did not quite succeed in destroying us.

Now, however, the CEA is ready to let go with its truly devastating weapon—the "finding" by the judicial officer that Economou is "guilty as charged." This is the occasion, the juncture, that the CEA has been working toward. The time has come to inflict the coup de grace to Arthur Economou. Forevermore, he will be silenced, and his career will have come to an end, never again to threaten the grooves of tradition that so comfortably fit the outlook of the CEA

hierarchy but which are so detrimental to our nation's investors and trade groups.

I again ask the Court to protect me, by granting the relief sought herein, from the irreparable harm and damage that now impends.

I ask the Court to grant me the right and the opportunity to prove that CEA Docket No. 167 represents a proceeding wherein a group of men have used the awesome power of the U. S. Government to inflict damage upon, with the purpose of destroying, a citizen and his organizations in the commodity and financial fields, to their own private ends.

In addition to destroying my reputation and my career, the adverse finding and verdict of the judicial officer would also bring about my complete financial ruin. The black cloud of a finding and decision of guilt would have immediate adverse repercussions throughout all eight organizations which I created and head.

Avenues for the financing of these eight organizations, through borrowings or equity stock issues, and developmental measures, through sales efforts and promotions, would be severely restricted, and in some instances, cut off completely, thus endangering the financial interests and safety of hundreds of customers, investors and participants in the activities of these eight organizations.

Under such circumstances, it would be necessary for me to remove the stigma of my pervasive "guilt," in order not to endanger the financial interests of hundreds of innocent persons, by eliminating myself from these eight organizations. To accomplish that, I would be forced to completely liquidate my interests under the most adverse of circumstances, under great pressure, and at extreme monetary sacrifice, resulting in my financial ruin.

* * *

"T"

Effects of Injunctive Relief Totally Constructive

The injunctive relief sought herein will produce only constructive effects and will not adversely affect or harm any party.

The interests of third parties will not be adversely af-

fected by the granting of a preliminary injunction. In granting our request for a 60-day moratorium in CEA Docket No. 167 on November 30, 1971, the judicial officer noted that the CEA prosecuting attorney did not object to our request "since it does not appear that further prolongation of this proceeding will adversely affect third parties."

The interests of the CEA, in the performance of its functions as set forth in the Commodity Exchange Act, will not be adversely affected by the injunctive relief sought herein. None of our activities is subject to CEA rules or regulations.

On the other hand, the relief sought herein will serve to avert the immediate and irreparable injury and damage that will be inflicted upon me and my interests in the eight organizations which I founded and head, if the CEA is allowed to take any further steps in CEA Docket No. 167. The relief sought herein will also serve to preserve the status quo of the CEA/Economou situation pending a more complete resolution of the matters herein.

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General

1) Plaintiff has tried to get the CEA to withdraw their proceedings under CEA Docket No. 167 by repeatedly pleading with them, but to no avail.

2) Plaintiff has not made prior application for the relief sought herein to this or any other Court.

3) The application for a preliminary injunction is brought on by an order to show cause rather than a motion on notice because the defendants have notified plaintiff that an oral argument before the judicial officer in the CEA Docket No. 167 proceeding and the issuance of the judicial officer's findings and decision may be had at any time after February 1, 1972, and the holding of such oral argument and the issuance of such findings and decision would immediately and irreparably injure the plaintiff.

ARTHUR N. ECONOMOU

Sworn to before me, this
3rd day of February, 1972

JOSEPH GALLAY
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR N. ECONOMOU, *Plaintiff*, —v— UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, *Defendants.*	AFFIDAVIT 72 Civ. 478 PRO SE

STATE OF NEW YORK COUNTY OF NEW YORK SOUTHERN DISTRICT OF NEW YORK	ss.:

T. REED McMINN, being duly sworn, deposes and says:

I am the Regional Administrator in the New York Regional Office of the Commodity Exchange Authority. I submit this affidavit in opposition to plaintiff's motion for a preliminary injunction.

To my personal knowledge of the matters involved in the disciplinary proceeding CEA Docket No. 167, the Hearing Examiner, Jack W. Bain, and the Judicial Officer, who will hear the appeal of the Hearing Examiner's report, did not participate in any manner in the investigatory or prosecutory functions handled by the staff of the Commodity Exchange Authority. Any implication to the contrary appearing in plaintiff's lengthy affidavit sworn to February 3, 1972, is hereby denied.

T. REED McMINN

Sworn to before me this 14th day of February, 1972.

WALTER G. BRANNON
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR N. ECONOMOU,
Plaintiff,

—v—

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, SECRETARY OF AGRICULTURE; RICHARD T. LYNG, ASSISTANT SECRETARY OF AGRICULTURE; COMMODITY EXCHANGE AUTHORITY; ALEX C. CALDWELL, ACT ADMINISTRATOR, COMMODITY EXCHANGE AUTHORITY; CHARLES E. ROBINSON, DIRECTOR, COMPLIANCE DIVISION, COMMODITY EXCHANGE AUTHORITY; RICHARD E. KIRCHHOFF, DEPUTY DIRECTOR, REGISTRATION AND AUDIT DIVISION, COMMODITY EXCHANGE AUTHORITY; JACK W. BAIN, CHIEF HEARING EXAMINER, UNITED STATES DEPARTMENT OF AGRICULTURE; RICHARD W. DAVIS, JR., COUNSEL, UNITED STATES DEPARTMENT OF AGRICULTURE; T. REED MCMINN, REGIONAL ADMINISTRATOR, NEW YORK REGIONAL OFFICE, COMMODITY EXCHANGE AUTHORITY; CLEMENT GROSS, AUDITOR, COMMODITY EXCHANGE AUTHORITY; MURRAY A. WOLKIS, AUDITOR, COMMODITY EXCHANGE AUTHORITY; EDWARD F. FITZPATRICK, AUDITOR, COMMODITY EXCHANGE AUTHORITY
Defendants.

AFFIDAVIT

Pro-SE
72 Civ. 478

RICHARD W. DAVIS, JR., being duly sworn, deposes and says:

1. I am an attorney in the Office of General Counsel, United States Department of Agriculture and a defendant herein. I represent the Secretary of Agriculture in CEA Docket No. 167, the administrative action sought to be enjoined herein, and am familiar with all aspects of the proceedings had in that matter. I have studied the complaint and affidavit of the plaintiff in this action and am familiar with the allegations of fact, conclusions and demands set forth in those documents.

2. This affidavit is made on the basis of personal knowledge as to my own actions, as to the actions of Jack W. Bain, Chief Hearing Examiner, in the conduct of the oral hearing in CEA Docket No. 167, and as to the actions of Alex C. Caldwell, Charles E. Robinson, Richard E. Kirchhoff, T. Reed McMinn, Clement Gross, Murray A. Wolkis, and Edward F. Fitzpatrick in the preparation for and conduct of the administrative proceeding in CEA Docket No. 167. The statements in this affidavit regarding matters other than those described above are made on the basis of daily involvement in the legal aspects of the operations of the Commodity Exchange Authority for more than two years, familiarity with the provisions of the Commodity Exchange Act (7 U.S.C. Chapter 1), the rules, regulations and orders of the Commodity Exchange Commission, and the Secretary of Agriculture thereunder and the regulations of the Commodity Exchange Authority, under the Freedom of Information Act (17 CFR Chapter I), and on information and belief. The sources of my information and the grounds for my belief in the truth of the statements so based are documents and communications received by me in my official capacity.

3. An amendment to the Commodity Exchange Act which became effective on June 18, 1968 (Pub. L. 90-258, 82 Stat. 28, 7 U.S.C. 6f(2)) authorized the Secretary of Agriculture to prescribe minimum financial requirements to be met by all persons registered as, or seeking registration as, futures commission merchants under the Act. The Secretary published such requirements on January 16, 1969 (34 F.R. 599). The detailed requirements are in 17 CFR 1.17; the related reporting requirements are in 17 CFR 1.10. The Commodity Exchange Authority, on March 19, 1969, sent letters to all registered futures commission merchants which were not subject to the financial requirements

of the Chicago Board of Trade or the Chicago Mercantile Exchange, requesting that they file an initial financial statement as of March 31, 1969. Such a letter was sent to Arthur N. Economou and Co., Inc., a futures commission merchant operated and controlled by plaintiff herein. After receipt and review of the statement of plaintiff's firm, and because the validity of some claimed current assets was questioned, the Director of the Registration and Audit Division of the Commodity Exchange Authority, on or about April 21, 1969, directed the regional office in New York to institute an audit to determine the accuracy of the financial statement. Such audits are conducted on a routine basis of all firms which are not subject to the financial requirements of the Chicago Board of Trade and the Chicago Mercantile Exchange. The Secretary has determined that the financial requirements of those exchanges are adequate for the purposes of the Commodity Exchange Act. This audit was conducted, primarily by Edward F. Fitzpatrick, an auditor in the New York office and a defendant herein. As a result of the audit, it was determined that plaintiff's firm failed by nearly $6,000 to meet the minimum financial requirements. Subsequently, on the basis of other financial statements from the firm, it was determined that there were continuing deficiencies. On February 19, 1970, a complaint was issued. Ten other complaints, alleging failure to meet minimum financial requirements have been issued between May 29, 1969, and September 28, 1971. Oral hearing was set for March 31, 1970. After two extensions of time requested by the respondent, respondents answer was filed on April 23, 1970. Because nearly a year had elapsed since the audit, the Office of General Counsel suggested that a further examination be made to determine respondent's current financial condition. This examination was made by Clement Gross, an auditor in the New York office and a defendant herein. It was determined that plaintiff's firm failed by nearly $25,000 to meet the minimum financial requirements as of March 31, 1970. Consequently, an amended complaint was issued on June 22, 1970, updating the allegations. A hearing was held in New York City on August 5, 6, 7, and 10, 1970, before Jack W. Bain, Chief Hearing Examiner, Department of Agriculture and a defendant herein. I appeared as counsel for the complainant. Edward F. Fitzpatrick, T. Reed McMinn, Richard E. Kirchhoff and Clement Gross, all employees of the Commodity Exchange Authority and defendants herein, presented evidence for the complainant. Suggested findings of fact, conclusions of law and order and briefs in support thereof were submitted by both parties with the final submission, by respondent, being filed on March 8, 1971. The hearing examiner filed his recommended decision on August 17, 1971. Respondents filed exceptions to the recommended decision on November 5, 1971, and requested oral argument before the Secretary. Subsequently, respondents requested a 60-day moratorium in the proceedings which was granted by the Judicial Officer on November 30, 1971. That moratorium expired on February 1, 1972. The matter is now pending before the Judicial Officer. A date for oral argument has not been set.

4. Earl L. Butz is the Secretary of Agriculture. He has not been directly involved in any of the actions alleged in the complaint herein.

5. Richard E. Lyng is the Assistant Secretary of Agriculture for Marketing and Consumer Services. His responsibilities include providing general direction for the operations of the Commodity Exchange Authority. His actions in issuing the complaint and the amended complaint in CEA Docket No. 167 and in his conversation and correspondence with plaintiff were entirely within the course of his official duties.

6. Alex C. Caldwell is the Administrator of the Commodity Exchange Authority, United States Department of Agriculture. His responsibilities include the formulation, direction, and supervision of the execution of the policies governing the activities of the Commodity Exchange Authority, and administration and enforcement of the Commodity Exchange Act, the orders of the Commodity Exchange Commission, and the orders and regulations of the Secretary of Agriculture promulgated under the Commodity Exchange Act. He has final authority to issue calls and requests for information in connection with the administration of the Commodity Exchange Act. His actions in causing an investigation to be made of the financial condition of Arthur N. Economou and Co., Inc., a respondent in CEA Docket No. 167, in causing the initiation of the administrative action in CEA Docket No. 167, in his conferences and correspondence with plaintiff regarding that action and

regarding the enterprises of plaintiff, in releasing to the press an announcement of the issuance of the complaints in that proceeding, and in causing appropriate employees of the Commodity Exchange Authority to collaborate with me in the preparation and presentation of the government case in CEA Docket No. 167 were entirely within the course of his official duties.

7. Charles E. Robinson is the Director of the Compliance Division of the Commodity Exchange Authority. His responsibilities include providing technical leadership, guidance and review to the national program of compliance investigations of alleged or apparent violations of the Act and regulations and recommends appropriate action when investigations disclose violations. He provides technical assistance to the Office of General Counsel in the preparation of administrative complaints and in review and analysis of evidence for presentation at administrative hearings. He reviews rules and proposed rules of applicants for designation as contract market to determine whether they meet the requirements of the Act and regulations. Based upon such review, he recommends approval or disapproval of the application. His actions in relation to the initiation of the administrative action in CEA Docket No. 167, in his conversations and correspondence with plaintiff regarding that action and regarding the enterprises of plaintiff, in collaborating with me in the preparation of the government case in CEA Docket No. 167 and in furnishing information about plaintiff requested by representatives of the Securities and Exchange Commission were entirely within the course of his official duties.

8. Richard E. Kirchhoff is the Deputy Director of the Registration and Audit Division of the Commodity Exchange Authority. The responsibilities of that division include providing technical leadership, guidance and review to the national program of minimum financial requirements for futures commission merchants and to the national program of audits of the books and records of futures commission merchants to assure proper segregation of customers' funds and to determine compliance with minimum financial standards. It analyzes financial reports of futures commission merchants, who are not members of exchanges with approved financial requirements programs, to determine whether they meet minimum financial standards. Mr.

Kirchhoff's actions in relation to the initiation of the administrative action in CEA Docket No. 167, in reviewing the financial statements submitted by Arthur N. Economou and Co., Inc., in reviewing the reports of audits of the books and records of that firm, in collaborating with me in the preparation and presentation of the government case in CEA Docket No. 167 and in presenting evidence in the oral hearing in that proceeding were entirely within the course of his official duties.

9. Jack W. Bain is the Chief Hearing Examiner of the United States Department of Agriculture. His function, insofar as the proceeding in CEA Docket No. 167 is concerned, was to act as referee. His responsibilities as referee were to rule upon motions, requests, and objections, set the time and place of hearing, administer oaths to witnesses, admit or exclude evidence, receive evidence, do all acts and take all measures necessary for the maintenance of order and efficient conduct of the proceeding, receive proposed findings of fact, conclusions and orders from the parties and prepare and file his recommended decision. His actions in conducting the proceeding and in preparing and filing his recommended decision were entirely within the course of his official duties.

10. I am an attorney in the Office of General Counsel, United States Department of Agriculture. My responsibilities in connection with disciplinary proceedings such as that in CEA Docket No. 167 are to review investigation reports, prepare complaints and other pleadings instituting disciplinary proceedings, prepare exhibits and interview witnesses in the preparation for trial of such matters, examine and cross-examine witnesses, argue motions and objections in the course of such proceedings, prepare briefs in support of the government case, and prepare and participate in oral argument of such matters before the Secretary of Agriculture. My actions in preparing and presenting the government case in CEA Docket No. 167, in collaboration with various officials and employees of the Commodity Exchange Authority, were entirely within the course of my official duties.

11. T. Reed McMinn is the Director of the Eastern Region of the Commodity Exchange Authority. This region includes the state of New York. His responsibilities include

the direction, coordination and conduct of all activities of the Commodity Exchange Authority incident to the administration of the Commodity Exchange Act within the Eastern Region. His actions in causing audits to be made of the books and records of Arthur N. Economou and Co., Inc., in relation to the initiation of the administrative action in CEA Docket No. 167, in his conversations and correspondence with plaintiff, in collaborating with me in the preparation and presentation of the government case in CEA Docket No. 167, and in presenting evidence in the oral hearing in that proceeding were entirely within the course of his official duties.

12. Clement Gross and Edward F. Fitzpatrick are auditors in the Commodity Exchange Authority. Their duties are to conduct audits of the books and records of futures commission merchants registered as such under the Commodity Exchange Act in order to assure proper segregation of customers' funds, to determine compliance with minimum financial requirements and to determine compliance with the recordkeeping requirements of the Commodity Exchange Act and the regulations thereunder. Their actions in auditing the books and records of Arthur N. Economou and Co., Inc., in reporting the results of those audits to their supervisors, in collaborating with me in the preparation and presentation of the government case in CEA Docket No. 167, and in presenting evidence in the oral hearing in that proceeding were entirely within the course of their official duties.

13. Murray A. Wolkis is an employee of the Commodity Exchange Authority assigned to the Eastern Region office. From February 25, 1968, to February 21, 1970, he was Chief of the Registration and Audit Branch with responsibilities, at the regional level, similar to those described in paragraph 8 above. From February 22, 1970, to February 20, 1971, he was Chief of the Compliance Branch with responsibilities, at the regional level, similar to those described in paragraph 7 above. From February 21, 1971, to date he has been a Senior Auditor with responsibilities similar to those described in paragraph 12 above. His actions in participating in audits of the books and records of Arthur N. Economou and Co., Inc. as supervisor and auditor were entirely within the course of his duties as

Chief, Registration and Audit Branch; his actions in collaborating with me in the preparation and presentation of the government case in CEA Docket No. 167 and in his conversations with plaintiff were entirely within the course of his duties as Chief, Registration and Audit Branch and Chief, Compliance Branch.

RICHARD W. DAVIS, JR.
Attorney, Office of General Counsel

Sworn to before me this 11th day of February 1972.

Sig. illegible

Notary Public

UNITED STATES DEPARTMENT OF AGRICULTURE
Commodity Exchange Authority
Washington, D. C. 20250

ISSUANCE OF COMPLAINT—CEA Docket No. 167
(Administrative Hearing under the Commodity Exchange Act)

A complaint and notice of hearing has been signed by the Assistant Secretary of Agriculture, charging violation of the Commodity Exchange Act by:

Arthur N. Economou,
Arthur N. Economou & Co., Inc.
(New York, New York)

The complaint charges that during the period from March 31 through June 30, 1969, while a registered futures commission merchant under the Act, the respondent corporation failed to meet minimum financial requirements prescribed for futures commission merchants.

The issuance of a complaint under the Commodity Exchange Act does not constitute proof of violation of the law. Such violation is established only when the Judicial Officer of the Department has made a determination that the evidence substantiates allegations in the complaint. Complaints are filed in the Office of the Hearing Clerk of the Department of Agriculture and are a matter of public record. Pending disposition by the Judicial Officer, it is the policy of the Commodity Exchange Authority not to comment or elaborate on charges contained in complaints or to discuss evidence on which they are based.

A public hearing on the complaint is scheduled to be held before a referee at 10:00 a.m., local time, March 31, 1970, in New York, New York.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR N. ECONOMOU, *et al.*, *Plaintiffs*, v UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, *Defendants.*	Civil Action No. 72 Civ. 478 L.F.M. INTERROGATORIES

TO: PAUL J. CURRAN, ESQ.
United States Attorney
Attorney for Defendants
Attention: MEL P. BARKAN, ESQ.
Assistant United States Attorney
Assistant Chief, Civil Division
United States Court House
Room 320
Foley Square
New York, N.Y. 10007

The Plaintiffs request that the Defendants, United States Department of Agriculture (hereinafter "USDA") and Commodity Exchange Authority (hereinafter "CEA") by an officer or agent thereof and the individual Defendants answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. State the name, address and position in government of each person who was involved in investigating the Plaintiffs, the American Board of Trade (hereinafter "ABT"), Arthur N. Economou & Co., Inc. (hereinafter "ANE Inc.") and Arthur N. Economou (hereinafter "ANE") from January 1, 1969 to March 28, 1974.
2. State the precise legal authority for such investigation in statute, rule, regulation, law or other promulgated legal rule.
3. State whether there were any policies within the Defendant government agencies, USDA and CEA, or in the offices of any of the Defendants, that formed a basis for investigation of Plaintiffs, ABT, ANE Inc. and ANE.
4. If the answer to interrogatory no. 3 above is yes, then in full detail provide said policy terms, date of issu-

ance, basis of its authority, and issuing department or division and/or individual, including the relevant address.

5. State which Defendants (including the names and addresses of each individual in a government agency) were involved in making a decision to investigate the Plaintiffs, ABT, ANE Inc. and ANE.

6. State which Defendants (including the names and addresses of each individual in a government agency) were involved in carrying out the investigation of the Plaintiffs, ABT, ANE Inc. and ANE.

7. State briefly the contents of all reports, meetings, discussions, phone calls, and other material that resulted from any investigation by any of the Defendants of Plaintiffs, ABT, ANE Inc. and ANE, and further state in whose custody, specifying the individual and their address, each such written statement or evidence of oral statement reposes.

8. State the name and address of each person interrogated, questioned or interviewed in any manner pursuant to any investigation of Plaintiffs, ABT, ANE Inc. and ANE, and state briefly the results of such questioning, interrogation, or interview, including describing in outline, the contents of any written or oral evidence of such interview and in whose custody each written or oral evidence reposes, specifying said individual and their address.

9. State the results of said investigation of ABT, ANE Inc. and ANE, including an outline of the contents of any written report resulting from said interview, the precise author of any such report, the date of any such report, and in which individual's custody, specifying his address, such report reposes.

10. What files were maintained by the Defendant agencies or the individual Defendants about the Plaintiffs, ABT, ANE Inc. and ANE; what documents are in said files, and in whose precise custody including the names and address of said individual, do said files now repose.

11. State which of the persons (including the address of said persons) in the Defendant government agencies USDA and CEA were involved in the decision to institute proceedings against Plaintiffs ANE, ANE Inc. on February 19, 1970 and June 22, 1970 and specify which individuals made such decisions and by what precise authority.

12. Specify in brief the role each individual in answer to interrogatory no. 11 played in deciding to institute proceedings against Plaintiffs.

13. Specify the specific legal basis for the institution of said proceedings per interrogatory no. 11 above, including the specific rule, regulation, ordinance, or other promulgated or enacted legal authority or authorities that formed the basis of said proceedings.

14. Specify whether any report about any of the Plaintiffs as a result of any investigation, formed the basis of said decision to institute said proceedings against Plaintiffs ANE and ANE Inc. and if so outline the contents of said reports, the date of said reports, the precise author of said reports including the address of the individual or individuals who prepared said reports and state in whose custody said reports repose.

15. State precisely the individuals in the USDA and CEA or individual Defendants (and their addresses) involved in carrying out the decision to institute proceedings against the Plaintiffs ANE and ANE Inc.

16. Specify briefly the role each individual, in answer to interrogatory no. 15 played in administering the decision to institute said proceedings Plaintiffs ANE and ANE Inc.

17. State the date and contents of the confirmation of Plaintiff ANE Inc.'s registration or renewal of registration form in 1968 and 1969. State specifically the individuals including the address of Defendants USDA and CEA or individual Defendants, concerned with passing said renewal application.

18. State what precise date the Plaintiff ANE Inc. was no longer subject to the jurisdiction of the Defendant USDA or Defendant CEA and provide the basis for such a determination.

19. State which individual employees of the Defendant government agencies USDA and CEA or the individual Defendants (including their addresses) released the press releases to the press about the proceedings against Plaintiffs ANE and ANE Inc.

20. Give the dates and times said press releases were released; the contents of said press releases; the groups and individuals to which said press releases were given both inside and outside the government including the names and addresses of individuals who received said press releases.

21. Aside from press releases, specify which individual Defendants or individuals in the USDA and CEA, (including their current addresses) had contact with the media (including radio, television, newspapers, magazines) about the Plaintiffs and specify the date of said meeting the individuals from the media contacted with in person, by phone or by mail, and the brief contents of said communication and specify in whose possession the evidence of such communications now repose.

22. Give the name and address of the person who authorized the release of said press releases on each occasion or any other release to the media regarding the proceedings against Plaintiffs ANE and ANE Inc.

23. Give the names and addresses of the individuals in the employ of the Defendant government agencies or individual Defendants who authorized the omission of the answer of the Plaintiffs and the omission of other papers in said release or communication.

24. Give the names and addresses of persons who were in the employ of the Defendant government agencies or individual Defendants who drafted the press releases and other release to the media including the individuals who drafted the portion indicating the Plaintiffs ANE and ANE Inc.'s financial resources had deteriorated.

25. Give the names and addresses of the individuals who reclassified assets of the Plaintiff ANE Inc. to indicate that said firm did not meet the financiai requirements of the Defendant CEA and give the precise legal basis for such a reclassification.

26. Describe the contents of the various conversations the Plaintiffs ANE and ANE Inc. had with the employees of the Defendant governmental institutions and the individual Defendants about the reclassification of such assets giving the names and addresses of the individuals involved and the date of said conversations and the name and address of the person who now has the record of said conversations.

27. Describe the basis for the decision to amend the complaint against the Plaintiffs ANE and ANE Inc. on or before June 22, 1970 in the proceedings brought by Defendants against the Plaintiffs.

28. Specify the reports, evidence and individuals (including their addresses) who made the decision to amend said

complaint and specify briefly the role each individual played in amending said complaint.

29. Specify in interrogatories 26 and 27 above, the individuals (including their addresses) and their positions who redrafted said complaint.

30. Specify which individuals in the Defendants USDA and CEA or which individual Defendants had communication with other governmental agencies from January 1, 1969 to March 28, 1974 about or concerning any of the Plaintiffs.

31. Specify in response to interrogatory no. 29 above, the date of such communication, the individuals involved in such communication on the Defendants side and the other agencies side, the purpose of such communication, the contents of such communication (in brief outline form) and the place where the evidence of such communication now reposes.

PLEASE TAKE NOTICE that a copy of said answers must be received by the undersigned within thirty (30) days after the service of these interrogatories.

Dated: March 19, 1975

DAVID C. BUXBAUM
Attorney for Plaintiffs
Suite 510
111 Broadway
New York, N.Y. 10006
(212) 349-5780

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR N. ECONOMOU
Arthur N. Economou & Co., Inc.
The American Board of Trade, Inc.
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture; RICHARD T. LYNG, Assistant Secretary of Agriculture, COMMODITY EXCHANGE AUTHORITY; ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority; CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority; RICHARD E. KIRCHHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority; JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture; RICHARD W. DAVIS, JR., Counsel, United States Department of Agriculture; T. REED MCMINN, Regional Administrator, New York Regional Office, Commodity Exchange Authority; CLEMENT GROSS, Auditor, Commodity Exchange Authority; MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority; EDWARD F. FITZPATRICK, Auditor, Commodity Exchange Authority, DONALD A. CAMPBELL, Judicial Officer, United States Department of Agriculture.

Defendants.

Civil Action
No. 72 Civ. 478
L.F.M.

VERIFIED
AMENDED
COMPLAINT

1. This proceeding is brought in part pursuant to Section 1331, 2201, 2202 of Title 28 of the United States Code and the relevant provisions of the Federal Tort Claims Act 28 USC 1291 ff; Section 1583 of Title 42 of the United States Code; Section 10 (b) of the Administrative Procedure Act

(5 USC 703); and the First and Fifth Amendments of the Constitution of the United States and such other Constitutional and Federal laws as may be relevant hereto.

2. Plaintiffs, The American Board of Trade, Inc. (hereinafter "ABT") and Arthur N. Economou & Co., Inc. (hereinafter "ANE Inc") are corporations incorporated under the laws of the State of Delaware and having their principal office and place of business at 286 Fifth Avenue, New York, N.Y.

3. Plaintiff Arthur N. Economou (hereinafter "ANE") is an individual resident of New York, with resident address at 115 E. 87th Street, New York, N.Y.

4. Defendants are the United States Government, its agencies, and employees thereof, some of whom are investigative or law enforcement officers thereof, who, acting in their ministerial capacity, did conspire to interfere with and violate, and did interfere with and violate, Plaintiffs' rights and privileges, and did deprive Plaintiffs of their property without due process of law, in conflict with the laws and Constitution of the United States, as more fully appears hereinbelow.

5. Defendants, Department of Agriculture, acting through the Defendant Commodity Exchange Authority and officers thereof, instituted proceedings against Plaintiffs ANE and ANE Inc. on February 19, 1970, and June 22, 1970, alleging that, as of certain dates, in 1969 and 1970 ANE Inc. failed to meet certain requirements applicable to "futures commission merchants" registered under the Commodity Exchange Act. Some time before the issuance of the February 19 complaint, Plaintiffs ANE and ANE Inc. had ceased to engage in the activities regulated by Defendants, and several weeks prior to such complaint Defendants had confirmed that ANE Inc., then a registrant, was in conformity with all legal requirements. Defendants issued the June 22 amended complaint against ANE and ANE Inc. at a time when they were no longer subject to regulation by Defendants in respect to the acts which they complained. Defendants issued each of the complaints without the notice or warning required by law.

6. Prior to the issuance of Defendants' illegal complaints and throughout their improper proceedings against ANE and ANE Inc., Plaintiffs and their affiliates were sharply

critical of the staff and operations of Defendants and carried on a vociferous campaign for the reform of Defendant Commodity Exchange Authority to obtain more effective regulation of commodity trading.

7. Defendants furnished the complaints to interested persons and others without furnishing Plaintiffs' ANE and ANE Inc. answers as well, and the New York office of the Defendant CEA failed to include such answers and other papers in the record in its file made available to the public.

8. Following the issuance of the amended complaint, Defendants issued a deceptive press release that falsely indicated to the public that Plaintiffs' ANE and ANE Inc. financial resources had deteriorated, when Defendants knew that their statement was untrue and so acknowledge previously that said assertion was untrue.

9. On January 8, 1973, Defendant Donald A. Campbell issued a final Decision and Order adopting verbatim the sanctions recommended by Defendant Bain and the complaints in the original action against the Plaintiffs herein. Though Plaintiffs had not for some years either been registered as futures commission merchants or otherwise subject to Defendants' regulatory authority, Defendants suspended ANE Inc.'s "registration", required ANE and ANE Inc. to cease and desist from violating requirements applicable only to registrants and denied them trading privileges on contract market for 90 days.

10. In the petition for review of Defendants' Decision and Order brought by ANE and ANE Inc., *Arthur N. Economou and Arthur N. Economou & Co., Inc. v. U.S. Department of Agriculture,* Dkt. No. 73-1221 (2d Cir. 1974), the Circuit Court of Appeals set aside Defendants' Decision and Order and dismissed their proceedings against ANE and ANE Inc. with prejudice, holding that the prosecution of the complaints was unlawful under federal law.

11. We believe the federal courts decision clearly leads to the conclusion that the actions of Defendants against ANE Inc. and ANE were outside the discretionary functions or duties of Defendants.

12. ANE Inc. and ANE's Motion for Taxation of Costs, pursuant to the Federal Rules of Appellate Procedure, to recover the costs they incurred in connection with their defense of the unlawful complaints, has been denied by the

Court of Appeals for the Second Circuit, so that out-of-pocket costs in the aggregate amount of approximately $30,000 which such Plaintiffs expended in their defense have not been recovered by them.

FOR A FIRST CAUSE OF ACTION

13. By bringing unauthorized proceedings against Plaintiffs ANE and ANE Inc. without notice or warning as required by law, Defendants violated the rights and privileges of the Plaintiffs under law and the United States Constitution, including their rights to due process of law.

14. By bringing unauthorized proceedings against the Plaintiffs ANE and ANE Inc., when they knew said Plaintiffs were leaving their jurisdiction, Defendants, in excess of their lawful authority, violated the rights and privileges of the Plaintiffs under law and the United States Constitution.

15. By bringing unauthorized proceedings against the Plaintiffs ANE and ANE Inc. when Plaintiffs were no longer subject to their jurisdiction, Defendants, in excess of their discretionary powers, violated the rights and privileges of the Plaintiffs under law and the United States Constitution.

16. By these unauthorized actions outside their discretionary functions and duties, Defendants sought to supress legitimate business activities of the Plaintiffs directly or indirectly that Congress did not give them authority to regulate, punish the Plaintiffs and accomplish the ruin of their business reputation, through harassing them, causing them to expend large amounts of time and money and publicizing the illegal complaint and order and issuing press releases that were not accurate.

FOR A SECOND CAUSE OF ACTION

17. The Defendants, in excess of their regulatory authority and their discretionary functions and powers, did issue administrative orders, illegal and punitive in nature, against the Plaintiffs after Plaintiffs ANE and ANE Inc. were no longer subject to their authority, deliberately causing the Plaintiffs substantial personal and economic harm, as aforesaid.

FOR A THIRD CAUSE OF ACTION

18. By the aforesaid unauthorized and illegal activities, which caused Plaintiffs to deplete financial and human resources, the Defendants discouraged and chilled the campaign of criticism Plaintiffs ANE and ANE Inc. directed against them, and thereby deprived the Plaintiffs of their rights to free expression guaranteed by the First Amendment of the United States Constitution.

FOR A FOURTH CAUSE OF ACTION

19. By furnishing their complaints to interested persons without furnishing Plaintiffs' ANE and ANE Inc. answers as well and by failing to include Plaintiffs' ANE and ANE Inc. answers and other papers in the file made available to the public by Defendants, Defendants exceeded their authority in violation of Section 9 (a) of the Administrative Procedure Act, 5 USC 558 (b), and, in violation of Plaintiffs' ANE and ANE Inc. rights to due process of law and right to privacy guaranteed by the United States Constitution, sought to subject Plaintiffs' unregulated business affairs to harm, discredit them and interfere with their nonregulated business operations.

FOR A FIFTH CAUSE OF ACTION

20. By issuing a deceptive press release to the media that falsely indicated the Plaintiffs' ANE and ANE Inc.'s financial resources had deteriorated when Defendants knew or should have known they did not, Defendants violated Plaintiffs' ANE and ANE Inc's right to due process of law, for the news release by ministerial officials damaged Plaintiffs' ANE and ANE Inc's credit standing and put pressure on Plaintiffs' staff to counter the false charges to which the release was devoted, and had a serious affect upon the Plaintiffs' public standing, the willingness of customers to do business with them and the businesses with which they were associated, such as Plaintiff ABT.

FOR A SIXTH CAUSE OF ACTION

21. Those Defendants who were law enforcement and investigative officers, acting in their ministerial capacity did act outside the scope of their authority and abuse legal

process by continuing to prosecute unlawfully brought complaints against Plaintiffs ANE and ANE Inc. and demanding sanctions against them when they were no longer under governmental jurisdiction.

FOR A SEVENTH CAUSE OF ACTION

22. Defendants who were law enforcement and investigative officers, acting in their ministerial capacity did act outside the scope of their authority and maliciously prosecute Plaintiffs ANE and ANE Inc. as aforesaid.

FOR AN EIGHTH CAUSE OF ACTION

23. Defendants, by wrongfully causing the publishing of false information about the Plaintiffs ANE and ANE Inc. and wrongfully making public distorted information about the Plaintiffs, did invade the privacy of the Plaintiffs and caused them injury.

FOR A NINTH CAUSE OF ACTION

24. Defendants did negligently and with intent to harm the Plaintiffs, ANE and ANE Inc. publish information about the Plaintiffs causing the Plaintiffs harm.

FOR A TENTH CAUSE OF ACTION

25. Defendants did in excess of their authority upon the facts stated hereinabove, trespass on Plaintiffs ANE, ANE Inc. and ABT property.

26. By reason of all of Defendants' illegal actions, Plaintiffs ANE, ANE Inc. and ABT and their business incurred heavy financial and emotional burdens and were damaged immeasurably, as were all institutions with which the Plaintiffs had a substantial connection.

WHEREFORE, Plaintiff demands:

A. Judgment against the Defendants for the costs and expenses incurred by Plaintiffs ANE and ANE Inc. in defending themselves against the Defendants' illegal activities in the amount of $30,000; and

B. Compensatory damages for injury to the business of the Plaintiffs in the amount of $5,000,000; and

C. Compensatory damages for the interference on the civil rights of the Plaintiffs in the amount of $4,000,000; and

D. Compensatory damages for the invasion of Plaintiffs privacy in the amount of $4,000,000.

E. Compensatory damages for malicious prosecution of Plaintiffs in the amount of $4,500,000.

F. Compensatory damages for abuse of process against the Plaintiffs in the amount of $6,000,000.

G. Compensatory damages for the trespass of the Defendants in the amount of $500,000.

H. Compensatory damages for taking of the property of Plaintiffs in the amount of $8,000,000.

That this court grant such other and further relief as may be just and proper.

/s/ David C. Buxbaum
DAVID C. BUXBAUM
Attorney for Plaintiffs
Suite 510, 111 Broadway
New York, New York 10006
(212) 349-5780

Dated: New York, New York
March 6, 1975

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

Arthur N. Economou, being first duly sworn deposes and says:

Deponent is an officer of all the Plaintiff corporations in this action and a Plaintiff in this action; Deponent has read the foregoing Amended Verified Complaint and knows the contents thereof; and the same is true to the Deponent's own knowledge, except as to the matters therein stated to be upon information and belief and as to these matters Deponent believes them to be true.

This verification is made by Deponent because Plaintiffs aside from Deponent are corporations and Deponent is an officer of said corporations.

/s/ Arthur N. Economou
ARTHUR N. ECONOMOU

Sworn to before me this 6th day of March, 1975.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR N. ECONOMOU, *et al.*,
Plaintiffs,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,
Defendants.

NOTICE OF MOTION TO DISMISS SECOND AMENDED COMPLAINT

72 Civ. 478 (LFM)

SIR:

PLEASE TAKE NOTICE that upon the memorandum of law and the opinion of the judicial officer of the United States Department of Agriculture submitted herewith, and upon all prior proceedings and papers filed herein, the defendants will move pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing the second amended complaint on the ground that as to the individual defendants it is barred by the doctrine of official immunity and as to the government agency defendants it is barred by the doctrine of sovereign immunity, at a motion term to be held before the Honorable Lloyd F. MacMahon, United States District Judge, in the United States Courthouse, Foley Square, New York, New York, on the 4th day of April 1975, or as soon thereafter as counsel may be heard.

You are required to serve your answering papers upon the attorney for the defendants on or before April 2, 1975 at 4:00 P.M.

Dated: New York, New York
March 20, 1975

Yours, etc.,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York,
Attorney for Defendants

By: Mel P. Barkan
MEL P. BARKAN
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Telephone No.: (212) 791-0052

TO: DAVID C. BUXBAUM, ESQ.

Attorney for Plaintiffs
Suite 510
111 Broadway
New York, New York 10006

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of November, one thousand nine hundred and seventy-six.

Present: HON. WALTER R. MANSFIELD,
HON. WILLIAM H. TIMBERS,
HON. THOMAS J. MESKILL, C.J.J.

Circuit Judges.

ARTHUR N. ECONOMOU, ARTHUR N. ECONOMOU & CO., INC. AND THE AMERICAN BOARD OF TRADE, INC.

Plaintiffs Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL BUTZ, SECRETARY OF AGRICULTURE, ETC., ET AL.

Defendants Appellees.

75-6050

It is hereby ordered that the caption in the within action and in the opinion of this court of April 23, 1976, be and it hereby is amended to include the name of defendant-appellee "Donald A. Campbell, Judicial Official, United States Department of Agriculture."

/s/ Walter R. Mansfield
HON. WALTER R. MANSFIELD, C.J.

/s/ Wm. H. Timbers
HON. WILLIAM H. TIMBERS, C.J.

/s/ Thomas J. Meskill
HON. THOMAS J. MESKILL, C.J.

A true copy,
(Name illegible), *Clerk*.

SUPREME COURT OF THE UNITED STATES

No. 76-709

EARL L. BUTZ, et al., *Petitioners,*

v.

ARTHUR N. ECONOMOU, et al.

ORDER ALLOWING CERTIORARI. Filed February 22, 1977.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

☆ U.S. Government Printing Office: 1977—234-667/5

No. 76-709

Supreme Court, U. S.
FILED
JAN 17 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

EARL L. BUTZ, ET AL.,

Petitioners,

vs.

ARTHUR N. ECONOMOU, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

LAW OFFICES OF
DAVID C. BUXBAUM, P.C.

David C. Buxbaum
Attorney for Respondents
11 Broadway, Suite 1612
New York, New York 10004
(212) 425-4347

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Argument	5
Conclusion	15

TABLE OF CITATIONS

Cases Cited:

Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974) . 7, 12, 13, 15, 16

Barr v. Matteo, 360 U.S. 564 (1969) 8, 9, 15

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972) 14

Black v. United States, 534 F.2d 528 (2d Cir. 1976) 14

Conley v. Gibson, 355 U.S. 41 (1957) 10

Doe v. McMillan, 412 U.S. 306 (1972) 5

Economou, et al., v. United States Department of Agriculture, 494 F.2d 519 (1974) 5

Economou, et al., v. United States Department of Agriculture, et al., 535 F.2d 688 (2d Cir. 1976) 1

Contents

Page

Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975) 11, 12

Pond v. General Electric Co., 256 F.2d 824 (9th Cir. 1958) 10

Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974) 14

Scheuer v. Rhodes, 416 U.S. 232 (1974) 5, 6, 10, 11, 12, 13, 14, 15

States Marine Lines, Inc. v. Schultz, 498 F.2d 1146 (4th Cir. 1974) 13, 14

Williams v. Gorton, 529 F.2d 668 (9th Cir. 1976) 10

Statutes Cited:

Administrative Procedure Act, 5 U.S.C. §551 et seq. 9

42 U.S.C. §1983 ..... 6, 11, 12, 15

United States Constitution Cited:

First Amendment 13, 14

Fourth Amendment 12, 14

Fifth Amendment 12, 13

Rules Cited:

Rules of the Supreme Court of the United States, Part V:

Rule 19(1) 10

Rule 19(1)(b) 10, 14

Contents

Page

APPENDICES

Appendix A — Notice of Motion to Dismiss Second Amended Complaint 1a

Appendix B — Decision of Court of Appeals 2a

Appendix C — Second Verified Amended Complaint 5a

In The

Supreme Court of the United States

October Term, 1976

No. 76-709

EARL L. BUTZ, et al.,

Petitioners,

vs.

ARTHUR N. ECONOMOU, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

The respondents, by their attorneys, Law Offices of David C. Buxbaum, P.C., submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the District Court is not officially reported but appended to the petition for a writ of certiorari. The opinion of the Court of Appeals is reported at 535 F.2d 688 and is appended to the petition for a writ of certiorari. A motion for a rehearing, containing a suggestion of rehearing *en banc*, was

denied on July 23, 1976, said decision (which was attached to the petition as Appendix B) noting that no active judge or judge who was a member of the panel requested that a vote be taken on said suggestion.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the petition. The Clerk of this Court has extended respondents' time in which to file a brief in opposition to and including January 18, 1977.

QUESTIONS PRESENTED

In addition to the question presented in the petition, the respondents suggest that there are two other questions that are presented in this case, namely:

1. Whether federal officials acting outside the scope of their authority are immune from suit; and

2. Whether a determination of the applicable scope of immunity can be made by a motion to dismiss the complaint prior to any factual hearing designed to discover the role officials played in certain illicit acts.

STATEMENT OF THE CASE

Respondents' second amended complaint was dismissed by the District Court as to these petitioners on the sole basis that it was ". . . barred by the doctrine of official immunity . . . ." The petitioners' motion to dismiss was made prior to any discovery, and after time to respond to interrogatories served by respondents had passed. A copy of the full text of the motion to dismiss is attached hereto (Appendix A, *infra*, 1a-2a). No affidavit accompanied the motion to dismiss, although a memorandum of law was made part of the motion. Therefore, in

essence, the individual petitioners admitted, for purposes of their motion, that all facts as stated in the complaint were true, but argued that they were nevertheless immune from suit because of the doctrine of official immunity.

Respondent Arthur N. Economou is a principal of respondent Arthur N. Economou and Co., Inc. The petitioners were all officers of either the United States Department of Agriculture or of the Commodity Exchange Authority, a regulatory body which was then acting under the aegis of the Department of Agriculture.

Some two months before instituting proceedings against respondents, the petitioners had approved the application of respondent Arthur N. Economou and Co., Inc., for registration as a futures commission merchant. By approving the registration, the petitioners certified that respondent Arthur N. Economou and Co., Inc., actually met all the financial requirements which, two months later, they charged respondents with failing to meet. Clearly, petitioners knew that they were estopped from alleging, as they did in their complaints, that as of certain dates in 1969 and 1970 the respondents failed to meet those requirements.

Prior to February 19, 1970, when petitioners issued their first complaint against respondents, both respondents had ceased to engage in activities regulated by petitioners. On June 22, 1970, when the amended complaint was issued by petitioners, both respondents Arthur N. Economou and Arthur N. Economou and Co., Inc., were no longer subject to the petitioners' financial requirement regulations. Both complaints were issued without the notice or warning required by federal law.

The real reason for the institution, without notice, of these unwarranted proceedings were twofold. Firstly, in October 1969, The American Board of Trade, Inc., one of the respondents to this action, was established as an exchange and marketplace,

which departed significantly from the established method of doing business, and thus was considered a threat to the traditional institutions in the commodities business. In addition, on previous occasions respondents and their affiliates had publicly criticized the staff and operation of the Commodity Exchange Authority and had carried on a vociferous campaign urging that it be reformed. Subsequently, the Commodity Exchange Authority was abolished and a new independent agency, the Commodity Futures Trading Commission, was established by Congress.

The petitioners' malicious conduct did not cease with the issuance of these unfounded complaints. For instance, they furnished copies of the complaints to interested persons, without furnishing copies of respondents' answers to the complaints. Following the issuance of their amended complaint on June 22, 1970, petitioners issued a deceptive press release that falsely indicated to the public that respondents' financial resources had deteriorated, although petitioners knew, and acknowledged before a hearing officer, that the assertion was untrue. After said acknowledgment, the same deceptive press release containing the same false information, was once again released by petitioners.

On January 8, 1973, the sanctions recommended by petitioner Bain were affirmed by petitioner Campbell, even though the respondents had, since December 1970, neither been registered as futures commission merchants nor otherwise subject to petitioners' regulatory authority. The sanctions involved suspension of Arthur N. Economou and Co., Inc.'s non-existent registration, and required respondents Arthur N. Economou and Arthur N. Economou and Co., Inc. to cease and desist from violating requirements applicable only to registrants, and denied them trading privileges on contract markets for ninety (90) days.

The respondents petitioned for review of petitioners' decision and order, and the Court of Appeals for the Second Circuit in a 1974 decision dismissed proceedings against the

respondents with prejudice, holding that the prosecution of the complaints was contrary to federal law. *Economou, et al. v. United States Department of Agriculture,* 494 F.2d 519 (1974) (Appendix B, *infra,* 2a -4a).

This action was instituted by respondents in 1972. The second amended complaint (Appendix C, *infra,* 5a -13a) was dismissed by the District Court prior to any substantive hearing and prior to any discovery. The facts alleged in the complaint were not disputed on the motion to dismiss, since the petitioners submitted no affidavit with their motion.

ARGUMENT

I.

The Court at this time should not grant the writ because the facts adduced thus far are insufficient to permit this Court to determine the scope of immunity, if any, that should be afforded the various petitioners who are the defendants in the action. As this Court has held in another case related to immunity, *Doe v. McMillan,* 412 U.S. 306 (1972), "[t]he scope of immunity has always been tied to the 'scope of . . . authority.'" 412 U.S. at 320. Thus, the scope of immunity, if any, must be determined after full discovery, and perhaps at trial, but cannot be determined at this preliminary stage of proceedings.

The District Court had no opportunity to determine exactly what role the various petitioners played in the actions that were taken against the respondents. Until such a factual determination can be made, any granting of a petition for certiorari is premature. Only when the roles of the various petitioners are known can a determination be made as to whether or not they have any immunity, and if any immunity exists, what the degree of immunity is. This Court has held in *Scheuer v. Rhodes,* 416 U.S. 232 (1974), at page 243:

> ". . . [T]he scope of that immunity will necessarily be related to facts as yet not established either by affidavits, admissions or a trial record. Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 USC §1983 . . . ."

This Court, at page 250 of its opinion in *Scheuer*, specifically set forth the various factual issues, raised but not yet settled at the "early pleading stage", which were relevant to a determination of whether the defendants acted within the scope of their duties and the range of discretion permitted them, and in good faith.[1] The Court concluded:

> "Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint." 416 U.S. at 250.

The motion to dismiss that petitioners seek to bring before this Court provides no information that explicates the duties and responsibilities of these various petitioners with regard to the

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1. "The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaints place directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good-faith obedience to the orders of their superiors." 416 U.S. at 250.

acts that occurred to the detriment of the respondents. The petition seeks to obviate this very essential problem by stating, on page 6:

> "As a part of the government's opposition to one of the earlier motions for an injunction, a detailed affidavit had been filed describing the actions taken by each individual defendant in the administrative proceedings that formed the basis of the judicial complaint (C.A. App. 10a-19a)."

However, absolutely no affidavits were presented with the motion to dismiss. Any prior affidavits were only relevant to a prior complaint, because the complaint had been amended twice since the commencement of this action. The prior complaints did not allege many of the causes of action now found in the present second amended complaint.

In *Apton v. Wilson*, 506 F.2d 83, 94 (D.C. Cir. 1974), it was noted that the case would have to be remanded for a determination of the scope of immunity because the defendant federal officers, like the petitioners in the instant case, had resisted efforts at discovery necessary to ascertain the nature of their responsibilities.[2]

The information necessary to determine the scope of immunity, if any, available to the various petitioners is absolutely lacking in the instant case. Therefore, respondents urge that the writ be denied.

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2. "An assertion of a qualified immunity would have to be accompanied by further factual presentation, concerning such matters as what the defendant knew about the nature of the demonstrations and the potential for disruption, what general arrangements were made between the defendants and those in direct command of the law enforcement personnel on the streets, and what the defendants knew about the actual conduct of the peace-keeping forces deployed during the demonstrations. The Justice Department defendants did not develop these matters in the District Court, but, consistent with their assertion of an absolute immunity, focused their presentation on showing that the defendants were acting in an official capacity, and resisted the plaintiffs' efforts at further discovery." 506 F.2d at 94.

II.

Other reasons also exist suggesting denial of the writ. The petitioners misread *Barr v. Matteo*, 360 U.S. 564 (1969), alleging that ". . . this Court held that those officals [sic] have absolute immunity." (Petition, 7). First of all, the *Barr* opinion does *not* state that federal government officials have absolute immunity for alleged torts committed in the performance of official duties. Secondly, while *Barr* dealt exclusively with acts held to be within the scope of official duties, it is alleged that some of the actions of the present petitioners were *outside* the scope of their official duties. Thirdly, *Barr* was exclusively a libel action, while this is not. It should further be noted that *Barr* was decided by the narrowest possible majority of the Court. Four Justices joined in Mr. Justice Harlan's opinion, Mr. Justice Black rendered a concurring opinion, and four Justices dissented, filing three separate opinions.

The opinion of the Court in *Barr* recognized that the issue was ". . . privilege as a defense by officers of the government to civil damage suits *for defamation and kindred torts* . . . ." (360 U.S. at 569, emphasis added). It noted that the privilege cannot ". . . properly be restricted to executive officers of cabinet rank . . . " (360 U.S. at 572). The Court went on to say:

> "To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted — the relation of the act complained of to 'matters committed by law to his control or supervision . . . .'" 360 U.S. at 573.

Therefore, the Court held that though the question was a "close one" (360 U.S. at 574), the particular individual in question, Barr, when acting within the scope of his authority as a high-ranking officer, was immune to suit *for libel*. Barr, it should be noted, was the head of a federal agency and thus his discretionary authority was presumably quite broad. The *Barr* decision did not state that all federal officers are immune from suit, even suit for libel, under all circumstances.

III.

Petitioners' suggestion (Petition, 9) that the Court of Appeals ". . . left undisturbed the district court's finding . . . that the allegedly tortious conduct of petitioners was 'both within the scope of their authority and discretionary . . .'" is not accurate. The Court of Appeals did not decide whether petitioners' actions were within the scope of their authority and discretionary, but said that even if such were the case, the petitioners would not be absolutely immune from suit.

Some mention ought to be made of precisely what a dismissal of this complaint would mean. Since the allegations of the complaint must be taken as true for purposes of this motion, a dismissal would mean that federal officers are not subject to civil liability although they: use their powers to curtail free speech; knowingly issue false press releases with intent to injure respondents; conspire to deprive respondents of property without due process of law; deliberately bring unauthorized proceedings against respondents without notice required by law, knowing that respondents were leaving their jurisdiction; seriously damage the respondents' business through harassment; issue illegal, punitive administrative orders against persons no longer subject to their authority; provide copies of their complaints to interested persons without furnishing respondents' answers, and fail to include the answers in the public file in violation of the Administrative Procedure Act; while holding office as law enforcement or investigative officers, act outside the scope of their authority; and trespass on the property of

respondents. Certainly, in an era of ever-expanding federal regulation, citizens must be given some civil recourse against officers who abuse their authority.

Motions to dismiss are disfavored in federal courts. *Pond v. General Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958); *Williams v. Gorton*, 529 F.2d 668 (9th Cir. 1976). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45.

IV.

The rules of this Court state that the writ of certiorari ". . . will be granted only where there are special and important reasons therefor." Supreme Court Rule 19(1). None of the criteria specifically set forth in Rule 19(1)(b) governing the grant of a writ of certiorari to review a decision of a court of appeals[3] seems applicable to the case at bar.

The Court of Appeals has not "decided an important question of federal law which has not been, but should be settled by this court . . . ." Supreme Court Rule 19(1)(b). The scope of executive officials' immunity from civil liability was decided by this Court in *Scheuer v. Rhodes, supra.*

The petition urges that only state officials are covered by the decision in *Scheuer v. Rhodes, supra.* and that federal officials ". . . require broader protection than the Court outlined

3. "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Supreme Court Rule 19(1)(b).

in *Scheuer* for state officials sued under 42 U.S.C. 1983." (Petition, 15). However, nothing expressly or impliedly included in *Scheuer* gives any reason to believe that this Court would hold that federal executive officials are entitled to any greater scope of immunity than state officials. The various courts of appeals have certainly not felt that *Scheuer* left them free to apply absolute immunity whenever federal officials were involved. With virtual unanimity, they have interpreted *Scheuer* as applying to federal as well as state officials.

The Ninth Circuit has so held in *Mark v. Groff*, 521 F.2d 1376 (1975), an action brought by an accountant against IRS agents who allegedly took malicious and intentional action to ruin his tax return preparation business.[4] The court stated that *Scheuer* ". . . destroyed the notion of absolute immunity for executive officials . . ." (521 F.2d at 1379) and went on to deal with the agents' assertion that the *Scheuer* doctrine of qualified immunity applied only to state executive officials in §1983 actions. The defendant IRS agents, the court stated, offered

> ". . . no significant reason for distinguishing, as far as the immunity doctrine is concerned, between litigation under §1983 against state officers and actions against federal officers alleging violation of constitutional rights under the general federal question statute. In contrast, the practical advantage of having just *one* federal immunity doctrine for suits arising under federal law is self-evident. Further, the rights at stake in a suit brought directly under the Bill of Rights

4. "According to the complaint's allegations, which we must accept as true for the purposes of this appeal, the agents beginning in 1970 made false and derogatory statements to Mark's clients, unlawfully arrested appellant, and made false representations to a United States magistrate causing a high bond to be set; . . . told clients not to use Mark's services and warned the clients that if they continued to patronize Mark their returns would be audited." 521 F.2d at 1378.

> are no less worthy of full protection than the constitutional and statutory rights protected by §1983. Accordingly, we agree with several courts of appeals in holding that the official immunity doctrine in suits against federal officers for violation of constitutional rights is identical to the immunity doctrine applied in §1983 suits." 521 F.2d at 1380 (emphasis in original).

The court held that the IRS agents were ". . . entitled to no more than a qualified immunity for acts performed in the course of official conduct . . .", and remanded in accordance with *Scheuer's* direction that the scope of immunity would be related to the nature of the officers' responsibilities, which had not yet been established below. 521 F.2d at 1380.

The United States Court of Appeals for the District of Columbia in *Apton v. Wilson, supra,* 506 F.2d 83 (1974), a suit against officials of the United States Department of Justice, expressly held that the reasoning of the *Scheuer* decision,

> ". . . considered in the context of the present case, mandates rejection of the District Court's implicit conclusion that the Justice Department defendants are shielded by an absolute immunity while performing official functions. We hold that a qualified immunity, having the same general character as that contemplated by the Supreme Court in *Scheuer,* is available to the Justice Department defendants in the present action. Such an immunity appropriately allows vindication of the Fourth and Fifth Amendment rights at stake, while preserving for the officials involved a shield against liability that will allow vigorous, legitimate use of power." 506 F.2d at 92-93.

Similarly, in the case at bar, vindication of the respondents' First Amendment and Fifth Amendment rights would appear to be not only mandated by the *Scheuer* opinion but also reasonable and desirable.

The *Apton* court further stated that the defendants in that action,

> ". . . unlike the state officials in *Scheuer,* are the highest officers of a Federal executive department. The difference in office is relevant, for immunity depends in part upon 'scope of discretion and responsibilities of the office,' *Scheuer v. Rhodes, supra,* 416 U.S. at 247, 94 S.Ct. at 1692." 506 F.2d at 93.

The court in that case held that even with respect to the Attorney General,

> ". . . the absolute immunity often accorded prosecuting attorneys cannot shield the defendants in this case, for the prosecutor's absolute protection, like that of the judge from which it is derived, is both justified and bounded by the judicial traditions and procedures that limit and contain the danger of abuse." 506 F.2d at 92.

The Fourth Circuit stated, in *States Marine Lines, Inc. v. Schultz,* 498 F.2d 1146 (1974), that:

> "Although *Scheuer* involved a suit against state executive officers, the court's discussion of the qualified nature of executive immunity would appear to be equally applicable to federal officers." 498 F.2d at 1159.

In a footnote, the court continued:

> "This is indicated by the court's quotation from Barr v. Matteo which was a libel suit against a federal executive officer . . . ." 498 F.2d at 1159, n. 11.

In *Rowley v. McMillan*, 502 F.2d 1326 (1974), the Fourth Circuit specifically applied *Scheuer* to a suit brought against federal officers for violation of First and Fourth Amendment rights.

The Second Circuit, in addition to its persuasive opinion in the instant case, has applied the *Scheuer* doctrine of qualified immunity to federal officials in *Black v. United States*, 534 F.2d 528 (1976). See also, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339, 1346-47 (2d Cir. 1972), a case decided prior to *Scheuer*.

Thus it seems clear that the courts of appeals that have treated the matter see no reason to apply a different rule of immunity to federal and state officers. This is not a case in which ". . . a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter. . . ." Supreme Court Rule 19(1)(b).

V.

The petition broadly seeks immunity for virtually all of the petitioners, asserting that they were acting in judicial or prosecutorial capacities (Petition, 18-20). This assertion is ludicrous in view of the absence of any proof of the roles these various petitioners played in taking action against the respondents. The District Court has not permitted discovery, although interrogatories have been pending for some time, and respondents have made numerous attempts to obtain discovery by other means during these proceedings. In fact, the motion to

dismiss was made immediately after the respondents filed and served their interrogatories. The assertion in footnote 15 on page 19 of the petition, that petitioner Lyng, who issued the complaint (assuming that to be the correct description of his role in this matter) is absolutely immune from suit, would not seem to be consistent with the holding of the cases. Similarly, petitioner Caldwell, who, it is asserted, participated in the initiation of the prosecution, would, in order to obtain any sort of immunity, have to prove that he was involved in a discretionary activity, was acting in good faith, and was acting in a prosecutorial fashion.

The petition further asserts that ". . . the decision to make an investigation is a preliminary step looking to the administrative enforcement proceedings." *Id.* By that analogy, a vast number of government officials would be absolutely immune from suit because at one time or another they are involved in fact-finding activities which could in turn lead to information that may result in administrative enforcement proceedings. Certainly, no decision after *Scheuer v. Rhodes, supra*, and perhaps no prior decision, has granted such a broad scope of immunity to officials of the executive branch, or any other officials.

CONCLUSION

It appears that the courts of appeals of the various circuits are unanimous in holding that federal executive officers do not enjoy absolute immunity from suit. *Barr v. Matteo, supra*, reduced the availability of immunity. Courts of appeals treating the issue since *Scheuer* have uniformly held that executive officials, whether they be state officers in a §1983 suit or federal officials, do not enjoy absolute immunity from suit.

It has further been clearly held that a motion to dismiss alleging governmental immunity requires a factual foundation. Thus the District of Columbia Circuit Court in *Apton v. Wilson*,

supra, noted that even in a motion for summary judgment, which presumably would have to be backed by certain factual assertions, the plaintiffs would ". . . have an opportunity to proceed under Rule 56 including motion for discovery, to establish a genuine issue as to a material fact." 506 F.2d at 95, n. 13.

One can scarcely imagine a case less ready for consideration by this Court, in that it raises no fundamental issues of law, presents inadequate facts, and has been the subject of a court of appeals decision consistent with all other opinions of the other courts of appeals in almost every respect, and also consistent with the decisions of this Court. Clearly, this case should be remanded for discovery and further proceedings. The petition should be denied.

Respectfully submitted.

LAW OFFICES OF DAVID C. BUXBAUM, P.C.

David C. Buxbaum
Attorney for Respondents

January, 1977.

APPENDIX A

NOTICE OF MOTION TO DISMISS SECOND AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR N. ECONOMOU, *et al.*,

Plaintiffs,

-v-

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

72 Civ. 478 (LFM) Defendants.

S I R :

PLEASE TAKE NOTICE that upon the memorandum of law and the opinion of the judicial officer of the United States Department of Agriculture submitted herewith, and upon all prior proceedings and papers filed herein, the defendants will move pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing the second amended complaint on the ground that as to the individual defendants it is barred by the doctrine of official immunity and as to the government agency defendants it is barred by the doctrine of sovereign immunity, at a motion term to be held before the Honorable Lloyd F. MacMahon, United States District Judge, in the United States Courthouse, Foley Square, New York, New York, on the 4th day of April 1975, or as soon thereafter as counsel may be heard.

Appendix A

You are required to serve your answering papers upon the attorney for the defendants on or before April 2, 1975 at 4:00 P.M.

Dated: New York, New York

March 20, 1975

Yours, etc.,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York,
Attorney for Defendants

APPENDIX B

DECISION OF COURT OF APPEALS

Arthur N. ECONOMOU

and

Arthur N. Economou & Co., Inc.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

No. 759, Docket 73-1221.

United States Court of Appeals, Second Circuit.

Appendix B

Argued March 28, 1974.

Decided March 28, 1974.

Former futures commission merchants under the Commodity Exchange Act petitioned for review of Department of Agriculture order suspending them and enjoining them from operating as commission merchants without the minimum financial requirements established by regulation. The Court of Appeals held that where essential finding of willfulness was made in a proceeding instituted without customary warning letter, finding of willfulness was erroneous and sanctions imposed unwarranted.

Petition granted and order set aside.

Exchanges Key 5(2)

Where finding of willfulness in proceeding to suspend futures commission merchants under the Commodity Exchange Act was made in a proceeding instituted without the customary warning letter which judicial officer conceded might have resulted in prompt correction of the claimed insufficiencies, finding of willfulness was erroneous and 90-day suspension unwarranted. Commodity Exchange Act, §1 et seq., 7 U.S.C.A. §1 et seq.

Arthur N. Economou, petitioner pro se.

Jackson & Kupperman, Brooklyn, N.Y., on the brief for petitioner Corp.

Irving Jaffe, Acting Asst. Atty. Gen., Civil Div., Dept. of Justice (Morton Hollander and Michael H. Stein, Attys., Civil Div., Dept. of Justice, Washington, D.C., of counsel), on the brief for respondent.

Appendix B

Before KAUFMAN, Chief Judge, and SMITH and ANDERSON, Circuit Judges.

PER CURIAM:

Petitioners, who are no longer in business as futures commission merchants under the Commodity Exchange Act seek review of a 90-day suspension order, advancing numerous grounds, including estoppel, lack of evidence of violation and of willfulness. We need not address most of these, since it appears that the essential finding of willfulness, now passionately protested, was made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies. Under these circumstances, the finding of willfulness appears erroneous on the record taken as a whole, and the sanctions imposed unwarranted.

The petition for review is granted and the order set aside.

APPENDIX C

SECOND VERIFIED AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Arthur N. Economou
Arthur N. Economou & Co., Inc.
The American Board of Trade, Inc.

Plaintiffs,

v

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture; RICHARD T. LYNG, Assistant Secretary of Agriculture, COMMODITY EXCHANGE AUTHORITY; ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority; CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority; RICHARD E. KIRCHHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority; JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture; RICHARD W. DAVIS, JR., Counsel, United States Department of Agriculture; T. REED McMINN, Regional Administrator, New York Regional Office, Commodity Exchange Authority; CLEMENT GROSS, Auditor, Commodity Exchange Authority; MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority; EDWARD F. FITZPATRICK, Auditor, Commodity Exchange Authority, DONALD A. CAMPBELL, Judicial Officer, United States Department of Agriculture.

Defendants.

Appendix C

CIVIL ACTION NO. 72 Civ. 478

L.F.M.

1. This proceeding is brought in part pursuant to Section 1331, 2201, 2202 of Title 28 of the United States Code and the relevant provisions of the Federal Tort Claims Act 28 USC 1291 ff; Section 1583 of Title 42 of the United States Code; Section 10 (b) of the Administrative Procedure Act (5 USC 703); and the First and Fifth Amendments of the Constitution of the United States and such other Constitutional and Federal laws as may be relevant hereto.

2. Plaintiffs, The American Board of Trade, Inc. (hereinafter "ABT"), and Arthur N. Economou & Co., Inc. (hereinafter "ANE Inc") are corporations incorporated under the laws of the State of Delaware and having their principal office and place of business at 286 Fifth Avenue, New York, N.Y.

3. Plaintiff Arthur N. Economou (hereinafter "ANE") is an individual, resident of New York, with resident address at 115 E. 87th Street, New York, N.Y.

4. Defendants are the United States Government, its agencies, and employees thereof, some of whom are investigative or law enforcement officers thereof, who, acting in their ministerial capacity, did conspire to interfere with and violate, and did interfere with and violate, Plaintiffs' rights and privileges, and did deprive Plaintiffs of their property without due process of law, in conflict with the laws and Constitution of the United States, as more fully appears hereinbelow.

5. Defendants, Department of Agriculture acting through the Defendant Commodity Exchange Authority and the officers thereof, instituted proceedings against Plaintiffs ANE and ANE Inc. on February 19, 1970, and June 22, 1970, alleging that, as of

Appendix C

certain dates, in 1969 and 1970 ANE Inc. failed to meet certain requirements applicable to "futures commission merchants" registered under the Commodity Exchange Act. Some time before the issuance of the February 19 complaint, Plaintiff ANE and ANE Inc. had ceased to engage in the activities regulated by Defendants, and several weeks prior to such complaint Defendants had confirmed that ANE Inc., then a registrant, was in conformity with all legal requirements. Defendants issued the June 22 amended complaint against ANE and ANE Inc. at a time when they were no longer subject to regulation by Defendants in respect of the acts about which they complained. Defendants issued each of the complaints without the notice of warning required by law.

6. Prior to the issuance of Defendants' illegal complaints and throughout their improper proceedings against ANE and ANE Inc., Plaintiffs and their affiliates were sharply critical of the staff and operations of Defendants and carried on a vociferous campaign for the reform of Defendant Commodity Exchange Authority to obtain more effective regulation of commodity trading.

7. Defendants furnished the complaints to interested persons without furnishing Plaintiffs' ANE and ANE Inc. answers as well, and the New York office of the Defendant CEA failed to include such answers and other papers in the record in its file made available to the public.

8. Following the issuance of the amended complaint, Defendants issued a deceptive press release that falsely indicated to the public that Plaintiffs' ANE and ANE Inc. financial resources had deteriorated, and Defendants knew that their statement was untrue and so acknowledge previously that said assertion was untrue.

Appendix C

9. On January 8, 1973, Defendant Donald A. Campbell issued a final Decision and Order adopting verbatim the sanctions recommended by Defendant Bain and the complaints in the original action against the Plaintiffs herein. Though Plaintiffs had not for some years either been registered as futures commission merchants or otherwise subject to Defendants' regulatory authority, Defendants suspended ANE Inc.'s "registration", required ANE and ANE Inc. to cease and desist from violating requirements applicable only to registrants and denied them trading privileges on contract market for 90 days.

10. In the petition for review of Defendants' Decision and Order brought by ANE and ANE Inc., *Arthur N. Economou and Arthur N. Economou & Co., Inc. v. U.S. Department of Agriculture*, 759 F.2d 2415 (2d Cir. 1974), the Circuit Court of Appeals set aside Defendants' Decision and Order and dismissed their proceedings against ANE and ANE Inc. with prejudice, holding that the prosecution of the complaints was unlawful under federal law.

11. The federal courts have consequently decided that the actions of Defendants against ANE Inc. and ANE were outside the discretionary functions or duties of Defendants.

12. ANE Inc. and ANE's Motion for Taxation of Costs, pursuant to the Federal Rules of Appellate Procedure, to recover the costs they incurred in connection with their defense of the unlawful complaints, has been denied by the Court of Appeals for the Second Circuit, so that out-of-pocket costs in the aggregate amount of approximately $30,000 which such Plaintiffs expended in their defense have not been recovered by them.

Appendix C

FOR A FIRST CAUSE OF ACTION

13. By bringing unauthorized proceedings against Plaintiffs ANE and ANE Inc. without notice or warning as required by law, Defendants violated the rights and privileges of the Plaintiffs under law and the United States Constitution, including their rights to due process of law.

14. By bringing unauthorized proceedings against the Plaintiffs ANE and ANE Inc., when they knew said Plaintiffs were leaving their jurisdiction, Defendants, in excess of their lawful authority, violated the rights and privileges of the Plaintiffs under law and the United States Constitution.

15. By bringing unauthorized proceedings against the Plaintiffs ANE and ANE Inc. when Plaintiffs were no longer subject to their jurisdiction, Defendants, in excess of their discretionary powers, violated the rights and privileges of the Plaintiffs under law and the United States Constitution.

16. By these unauthorized actions outside their discretionary functions and duties, Defendants sought to suppress legitimate business activities of the Plaintiffs directly or indirectly that Congress did not give them authority to regulate, punish the Plaintiffs and accomplish the ruin of their business reputation, through harassing them, causing them to expend large amounts of time and money and publicizing the illegal complaint and order, issuing press releases that were not accurate.

FOR A SECOND CAUSE OF ACTION

17. The Defendants, in excess of their regulatory authority and their discretionary functions and powers, did issue administrative orders, illegal and punitive in nature, against the

Plaintiffs after Plaintiffs ANE and ANE Inc. were no longer subject to their authority, deliberately causing the Plaintiffs substantial personal and economic harm, as aforesaid.

FOR A THIRD CAUSE OF ACTION

18. By the aforesaid unauthorized and illegal activities, which caused Plaintiffs to deplete financial and human resources, the Defendants discouraged and chilled the campaign of criticism Plaintiffs ANE and ANE Inc. directed against them, and thereby deprived the Plaintiffs of their rights to free expression guaranteed by the First Amendment of the United States Constitution.

FOR A FOURTH CAUSE OF ACTION

19. By furnishing their complaints to interested persons without furnishing Plaintiffs' ANE and ANE Inc. answers as well and by failing to include Plaintiffs' ANE and ANE Inc. answers and other papers in the file made available to the public by Defendants, Defendants exceeded their authority in violation of Section 9 (a) of the Administrative Procedure Act, 5 USC 558 (b), and, in violation of Plaintiffs' ANE and ANE Inc. rights to due process of law and right to privacy guaranteed by the United States Constitution, sought to subject Plaintiffs' unregulated business affairs to harm, discredit them and interfere with their non-regulated business operations.

FOR A FIFTH CAUSE OF ACTION

20. By issuing a deceptive press release to the media that falsely indicated the Plaintiffs' ANE and ANE Inc.'s financial resources had deteriorated, when Defendants knew or should have known they did not, Defendants violated Plaintiffs' ANE and ANE Inc's right to due process of law, for the news release by ministerial officials damaged Plaintiffs' ANE and ANE Inc's

credit standing and put pressure on Plaintiffs' staff to counter the false charges to which the release was devoted, and had a serious affect upon the Plaintiffs' public standing, the willingness of customers to do business with him and the business as with which he was associated.

FOR A SIXTH CAUSE OF ACTION

21. Those Defendants who were law enforcement and investigative officers, acting in their ministerial capacity did act outside the scope of their authority and abuse legal process by continuing to prosecute unlawfully brought complaints against Plaintiff ANE and ANE Inc. and demanding sanctions against them when they were no longer under governmental jurisdiction.

FOR A SEVENTH CAUSE OF ACTION

22. Defendants who were law enforcement and investigative officers, acting in their ministerial capacity did act outside the scope of their authority and maliciously prosecute Plaintiffs ANE and ANE Inc. as aforesaid.

FOR AN EIGHTH CAUSE OF ACTION

23. Defendants, by wrongfully causing the publishing of false information about the Plaintiffs ANE and ANE Inc. and wrongfully making public distorted information available about the Plaintiffs, did invade the privacy of the Plaintiffs and caused them injury.

FOR A NINTH CAUSE OF ACTION

24. Defendants did negligently and with intent to harm the Plaintiffs, ANE and ANE Inc. publish information about the Plaintiffs causing the Plaintiffs harm.

Appendix C

FOR A TENTH CAUSE OF ACTION

25. Defendants did in excess of their authority upon the facts stated hereinabove, trespass on Plaintiffs ANE, ANE Inc. and ABT property.

26. By reason of all of Defendants' illegal actions, Plaintiffs ANE, ANE Inc. and ABT and their business incurred heavy financial and emotional burdens and were damaged immeasurably, as were all institutions with which the Plaintiffs had a substantial connection.

WHEREFORE, Plaintiff demands:

A. Judgment against the Defendants for the costs and expenses incurred by Plaintiffs ANE and ANE Inc. in defending themselves against the Defendants' illegal activities in the amount of $30,000; and

B. Compensatory damages for injury to the business of the Plaintiffs in the amount of $5,000,000; and

C. Compensatory damages for the interference on the civil rights of the Plaintiffs in the amount of $4,000,000; and

D. Compensatory damages for the invasion of Plaintiffs privacy in the amount of $4,000,000.

E. Compensatory damages for malicious prosecution of Plaintiffs in the amount of $4,500,000.

F. Compensatory damages for abuse of process against the Plaintiffs in the amount of $6,000,000.

G. Compensatory damages for the trespass of the Defendants in the amount of $500,000.

Appendix C

H. Compensatory damages for taking of the property of Plaintiffs in the amount of $8,000,000.

That this court grant such other and further relief as may be just and proper.

Dated: New York, New York
March , 1975

David C. Buxbaum
Attorney for Plaintiffs
Suite 510, 111 Broadway
New York, New York 10006
(212) 349-5780

STATE OF NEW YORK (
(SS:
COUNTY OF NEW YORK (

Arthur N. Economou, being first duly sworn deposes and says:

Deponent is an officer of all the Plaintiff corporations in this action and a Plaintiff in this action; Deponent has read the foregoing Amended Verified Complaint and knows the contents thereof; and the same is true to the Deponent's own knowledge, except as to the matters therein stated to be upon information and belief and as to these matters Deponent believes them to be true.

This verification is made by Deponent because Plaintiffs aside from Deponent are corporations and Deponent is an officer of said corporations.

Sworn to before me this March, 1975

s/ Arthur N. Economou
Arthur N. Economou

FILED
FEB 4 1977
MICHAEL RODAK, JR., CLERK

No. 76-709

In the Supreme Court of the United States

OCTOBER TERM, 1976

EARL L. BUTZ, ET AL., PETITIONERS

v.

ARTHUR N. ECONOMOU, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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REPLY MEMORANDUM FOR PETITIONERS

Respondents oppose the petition "because the facts adduced thus far are insufficient to permit this Court to determine the scope of immunity," which, respondents urge, "must be determined after full discovery, and perhaps at trial, but cannot be determined at this preliminary stage of proceedings" (Br. in Opp. 5).

At the time of petitioners' motion to dismiss, however, the district court had before it an affidavit explaining the roles petitioners played in the administrative proceedings upon which this suit is based (C.A. App. 10a-19a).[1]

---

[1]Contrary to respondents' contention (Br. in Opp. 7), this affidavit was not made irrelevant because it was submitted earlier in the litigation, before the complaint was amended. The affidavit details petitioners' involvement in the administrative proceedings regarding the respondents. Although the complaint was amended, the facts regarding the roles of petitioners in those proceedings did not change.

Based on the record before it, the district court found (Pet. App. B, p. 28a) that "[petitioners] have shown that their * * * acts were both within the scope of their authority and discretionary * * *." That finding, which the court of appeals did not disturb (see Pet. App. A, pp. 1a-22a), is sufficient under *Barr* v. *Matteo*, 360 U.S. 564, to warrant absolute immunity.[2] Accordingly, there is a sufficient factual record available now to enable this Court to determine the question presented in the petition, *i.e.*, whether federal government officials have an absolute rather than a qualified immunity from suit for damages based upon their performance of official duties in connection with administrative enforcement proceedings.[3]

Respondents' argument that the scope of immunity can be resolved only "after full discovery, and perhaps at trial" is incorrect in the context of a claim of absolute immunity. See *Howard* v. *Lyons*, 360 U.S. 593 (resolving an immunity question in a case essentially in the same litigation posture as the case here). Absolute immunity is designed not only to protect government officials from

[2]Respondents point out (Br. in Opp. 8) that only three other Justices joined in Mr. Justice Harlan's opinion in *Barr*, but that is not a fair measure of the authority of the legal principles which that opinion sets forth and upon which petitioners rely here. In his dissent in *Barr* (360 U.S. at 592), Mr. Justice Stewart stated that the plurality opinion "contains * * * a lucid and persuasive analysis of the principles that should guide decision in this troublesome area of law." Mr. Justice Stewart's only disagreement with the plurality concerned "the application of these principles to the facts of the present case" (*ibid.*). In the companion case to *Barr*, *Howard* v. *Lyons*, 360 U.S. 593, Mr. Justice Stewart joined the opinion of the Court, which granted absolute immunity on the basis of the plurality's legal analysis in *Barr* (see *id.* at 597).

[3]Indeed, the court of appeals indicated its agreement that the record was adequate for the application of *Barr* when it stated that it "might be inclined * * * to follow [*Barr*] in this case" "[h]ad [it] represented the last word in this evolving area * * *" (Pet. App. A, p. 8a).

the possibility of liability, but also to avoid the necessity of a trial. See *Barr* v. *Matteo*, 360 U.S. 564, 571. As this Court noted in *Imbler* v. *Pachtman*, 424 U.S. 409, 419 n. 13, absolute immunity "defeats a suit at the outset," whereas "[t]he fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial." The question presented here is whether petitioners are entitled to absolute immunity. Since the case is now in an appropriate posture for review of that question, allowing the litigation to proceed further without a final resolution of petitioners' claim would be to deny unnecessarily an element of the protection that petitioners seek.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

FEBRUARY 1977.

DOJ-1977-02

Supreme Court, U. S.
FILED
JUN 13 1977
MICHAEL RODAK, JR., CLERK

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BRIEF FOR THE PETITIONERS

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of argument	9
Argument:	
I. The rule that federal government officials have absolute immunity from damage suits based upon the performance of their official duties rests upon sound public policy considerations and should be reaffirmed	17
A. The absolute immunity of federal officials recognized in *Barr* v. *Matteo* rests upon sound public policy considerations	17
B. The rationale upon which the Court in *Barr* concluded that absolute immunity is necessary is as compelling today as when the case was decided, and the principle of absolute immunity should be continued	26
C. This Court's recent decisions holding that state officials sued for damages under 42 U.S.C. 1983 have only qualified immunity do not require or warrant a similarly limited immunity for federal officials	35

236-733—77——1

Argument—Continued
II. Under the doctrine of absolute immunity, the district court properly dismissed this suit against all the petitioners ---------- 41
Conclusion ---------- 59
Appendix ---------- 61

CITATIONS

Cases:

Adair v. *Bank of America National Trust Savings Assn.*, 303 U.S. 350---------- 19
Adickes v. *Kress & Co.*, 398 U.S. 144----- 31
Air East, Inc. v. *National Transportation Safety Board*, 512 F. 2d 1227, certiorari denied, 423 U.S. 863---------- 46
Apton v. *Wilson*, 506 F. 2d 88---------- 58
Barr v. *Matteo*, 360 U.S. 564---------- *passim*
Berberian v. *Gibney*, 514 F. 2d 790------ 22
Berndtson v. *Lewis*, 465 F. 2d 706------- 26
Bivens v. *Six Unknown Named Agents*, 456 F. 2d 1339---------- 31, 36, 58
Bowman v. *United States Department of Agriculture*, 363 F. 2d 81---------- 57
Bradley v. *Fisher*, 13 Wall. 335---------- 20, 26, 27, 44, 53, 54
Consolo v. *Federal Maritime Commission*, 383 U.S. 607---------- 42
Cooper v. *O'Connor*, 99 F. 2d 135------ 19, 21, 26
David v. *Cohen*, 407 F. 2d 1268------ 23, 25, 43
District of Columbia v. *Carter*, 409 U.S. 418 ---------- 37, 40
Doe v. *McMillan*, 412 U.S. 306---------- 10, 11, 22, 23, 24, 51
Economou v. *Department of Agriculture*, 494 F. 2d 519---------- 6

Cases—Continued

Federal Trade Commission v. *Cinderella Career and Finishing Schools, Inc.*, 404 F. 2d 1308---------- 56
Flood v. *Harrington*, 532 F. 2d 1248------ 52
George Steinberg and Son, Inc. v. *Butz*, 491 F. 2d 988---------- 46, 54
Gibson v. *Reynolds*, 172 F. 2d 95, certiorari denied, 337 U.S. 925---------- 19
Glass v. *Ickes*, 117 F. 2d 273, certiorari denied, 311 U.S. 718---------- 19
Gregoire v. *Biddle*, 177 F. 2d 579, certiorari denied, 339 U.S. 949---------- *passim*
Grossman v. *McKay*, 384 F. Supp. 99---- 26
Heine v. *Raus*, 399 F. 2d 785---------- 23, 26
Howard v. *Lyons*, 360 U.S. 593---- 13, 15, 21, 39
Imbler v. *Patchman*, 424 U.S. 409------- *passim*
Johnson v. *Alldredge*, 488 F. 2d 820, certiorari denied *sub nom. Cronrath* v. *Johnson*, 419 U.S. 882---------- 25, 26
Jones v. *Kennedy*, 121 F. 2d 40, certiorari denied, 314 U.S. 665---------- 19, 43, 54, 55
Lang v. *Wood*, 92 F. 2d 211, certiorari denied, 302 U.S. 686---------- 19
Laughlen v. *Rosenman*, 163 F. 2d 838---- 19
Mandel v. *Nouse*, 509 F. 2d 1031, certiorari denied, 422 U.S. 1008---------- 22, 23
Mark v. *Groff*, 521 F. 2d 1376---------- 58
Monroe v. *Pape*, 365 U.S. 167---------- 37
Nadiak v. *Civil Aeronautics Board*, 305 F. 2d 588, certiorari denied, 372 U.S. 913 ---------- 46
Norton v. *McShane*, 332 F. 2d 855, certiorari denied, 380 U.S. 981---------- 22

Cases—Continued

	Page
O'Leary v. *Brown-Pacific-Maxon*, 340 U.S. 504	42
Ove Gustavsson Contracting Co. v. *Floete*, 299 F. 2d 655, certiorari denied, 374 U.S. 827	23, 25, 30, 43, 51
Paul v. *Davis*, 424 U.S. 693	57
Papagianakis v. *The Samos*, 186 F. 2d 257, certiorari denied, 341 U.S. 921	19
Peterson v. *Weinberger*, 508 F. 2d 45, certiorari denied, 423 U.S. 830	23, 43
Pierson v. *Ray*, 386 U.S. 547	32, 36, 39, 40, 44, 53
Poss v. *Lieberman*, 299 F. 2d 358, certiorari denied, 370 U.S. 944	23
Ruderer v. *Meyer*, 413 F. 2d 175, certiorari denied, 396 U.S. 936	23
Sauber v. *Gliedman*, 283 F. 2d 941, certiorari denied, 366 U.S. 906	23
Scheuer v. *Rhodes*, 416 U.S. 232	*passim*
Spalding v. *Vilas*, 161 U.S. 483	19, 20, 21, 26, 27, 49, 54
Standard Nut Margarine v. *Mellon*, 72 F. 2d 557, certiorari denied, 293 U.S. 605	19
States Marine Lines, Inc. v. *Shultz*, 498 F. 2d 1146	58
Taylor v. *Glotfelty*, 201 F. 2d 51	19
Tenney v. *Brandhove*, 341 U.S. 367	39
United States v. *Diebold, Inc.*, 369 U.S. 654	31
White v. *Jaegerman*, 391 F. Supp. 438	43
Wood v. *Strickland*, 420 U.S. 308	*passim*
Wozencraft v. *Captiva*, 314 F. 2d 288	23
Yaselli v. *Goff*, 275 U.S. 503, affirming *per curiam*, 12 F. 2d 396	20, 52

Constitution, statutes, and regulations:

	Page
Constitution of the United States:	
First Amendment	8
Fifth Amendment (Due Process Clause)	8, 57, 58
Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. 1983	*passim*
Commodity Exchange Act, 42 Stat. 998, as amended, 7 U.S.C. (and Supp. V), 1 *et seq*	46
7 U.S.C. (Supp. V), 4a	47
7 U.S.C. 6f(2)	3, 47
7 U.S.C. 9	3, 47, 48, 55
7 U.S.C. 12	47, 56
7 U.S.C. 12a	55
7 U.S.C. 15	47
Commodity Futures Trading Commission Act of 1974, Pub. L. 93–463, 88 Stat. 1389:	
Sec. 101(a)(3)	47
Sec. 104	47
Sec. 411	47
Federal Aviation Act, 72 Stat. 779, as amended, 49 U.S.C. (Supp. V) 1429(a)	46
Federal Insecticide, Fungicide and Rodenticide Act, 86 Stat. 985, 7 U.S.C. (Supp. V) 136d(c)(2)	46
Occupational Safety and Health Act, 84 Stat. 1596, 29 U.S.C. 655(c)	46
5 U.S.C. 552	47
5 U.S.C. 552(a)	56
5 U.S.C. 588(c)	54
5 U.S.C. 703	8

Statutes and regulations—Continued Page
28 U.S.C. 1291 8
28 U.S.C. 1331 8
28 U.S.C. 2201 8
28 U.S.C. 2202 8
7 C.F.R. 1.1 (1970) 56
7 C.F.R. 1.1–1.4 (1970) 56
7 C.F.R. 1.4 (1970) 48, 56
7 C.F.R. 1.4(a)(3) (1970) 56
17 C.F.R. 0.2(m) (1970) 52
17 C.F.R. 0.2(n) (1970) 52
17 C.F.R. 0.3(c) (1970) 54
17 C.F.R. 0.7 (1970) 52
17 C.F.R. 0.11 (1970) 52
17 C.F.R. 0.11(c) (1970) 52
17 C.F.R. 1.10 (1970) 3
17 C.F.R. 1.17 (1970) 3, 47
17 C.F.R. 1.17(b) (1970) 3
17 C.F.R. 1.4 (1970) 48
17 C.F.R. 1.5 (1970) 56
17 C.F.R. 140.1(b) (1970) 48
17 C.F.R. 140.1(c)(1) (1970) 50
17 C.F.R. 140.1(c)(2) (1970) 50
17 C.F.R. 140.2 (1970) 51
17 C.F.R. 140.3–140.6 (1970) 56
17 C.F.R. 140.6 (1970) 56
Miscellaneous:
1 Administrative Regulation ¶ 210 (1963) 52
ALI, *Restatement of Torts* § 588 (1938) 52
Comment, *Federal Officers—Scope of Immunity from Damage Actions Available to Administrative Agency* Officials, 30 Rutgers L. Rev. 209 (1976) 45

Miscellaneous—Continued Page
Davis, *Administrative Law Treatise* § 2604 (1970 Supp.) 10, 19
29 Fed. Reg. 16211 48
29 Fed. Reg. 16214 48
36 Fed. Reg. 3210 48
37 Fed. Reg. 28463 48
37 Fed. Reg. 28475 48
Rule 56(c), Fed. R. Civ. P 31

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a–22a) is reported at 535 F. 2d 688. The opinion of the district court (Pet. App. B, pp. 23a–28a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, pp. 29a–30a) was entered on April 23, 1976. A petition for rehearing with a suggestion for rehearing *en banc* was denied on July 23, 1976 (Pet. App. D, pp. 31a–32a). On October 14, 1976, Mr. Justice Marshall extended the time within which to file a

petition for a writ of certiorari to and including November 19, 1976. The petition for a writ of certiorari was filed on that date and was granted on February 22, 1977 (A. 166). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether federal government officials have an absolute rather than a qualified immunity from suits for damages based upon their performance of official duties in connection with administrative enforcement proceedings.

STATEMENT

This is a suit seeking damages of $32 million from officials of the Department of Agriculture based upon their actions in initiating and conducting, allegedly wrongfully and maliciously, an administrative enforcement proceeding based upon respondent's violations of the Commodity Exchange Act. The district court dismissed the suit, holding that the officials had absolute immunity from suit for acts done as part of their official duties. The court of appeals reversed, ruling that the officials' immunity was only qualified, not absolute.

1. Respondent Arthur N. Economou and Co., Inc., which is controlled by respondent Economou (respondents are hereinafter referred to as "respondent"), was registered with the Department of Agriculture as a futures commission merchant (A. 144). As such it was required periodically to file reports,

including a financial statement showing that it maintained the minimum capital balance prescribed by the Secretary of Agriculture under the Act. 17 C.F.R. 1.17 (1970); see *id.* at 1.10 (1970).

Respondent's March 31, 1969, report raised a question concerning the validity of some of its claimed current assets (A. 144). For that reason, the Director of the Registration and Audit Division of the Commodity Exchange Authority directed the regional office in New York to institute an audit to determine the accuracy of the financial statement (A. 144).[1] Such audits are made routinely (A. 144).[2] The audit in this case was conducted primarily by petitioner Fitzpatrick (A. 144), an auditor in the Commodity Exchange Authority (A. 148).

In February 1970, following the audit and the receipt of other financial statements from respondent (A. 144), petitioner Lyng, Assistant Secretary of Agriculture, issued an administrative complaint under the Act (A. 145; see 7 U.S.C. 9). It alleged that respondent, while a registered futures commission

[1] The Director of the Registration and Audit Division was not named as a defendant in this case and thus is not a petitioner here. Petitioner Caldwell, the Administrator of the Commodity Exchange Authority, initiated the investigation of the financial condition of respondent (A. 145).

[2] Such audits are not conducted of firms that are subject to the financial requirements of the Chicago Board of Trade and the Chicago Mercantile Exchange, since the Secretary has determined that the financial requirements of those exchanges are adequate for the purposes of the Act (A. 144; see 7 U.S.C. 6f(2); 17 C.F.R. 1.17(b) (1970)).

merchant, willfully failed to maintain the minimum financial requirements prescribed by the Secretary. The complaint directed respondent to show cause why its registration should not be revoked or suspended and why it should not be prohibited for a period of time from trading on the commodity markets (CEA Docket No. 167).

Petitioner Caldwell, the Administrator of the Commodity Exchange Authority, was responsible for making copies of the administrative complaint available in the Department of Agriculture Press Room (see A. 145–146). Attached to the copies was a one-page cover sheet that provided in pertinent part (A. 150):

> The complaint charges that during the period from March 31 through June 30, 1969, while a registered futures commission merchant under the Act, the respondent corporation failed to meet minimum financial requirements prescribed for futures commission merchants.
>
> The issuance of a complaint under the Commodity Exchange Act does not constitute proof of violation of the law. Such violation is established only when the Judicial Officer of the Department has made a determination that the evidence substantiates allegations in the complaint. * * *

Following another audit, which was conducted by petitioner Gross, an auditor in the regional office (A. 144), petitioner Lyng in June 1970 issued an amended complaint alleging additional failures to meet the minimum capital requirements (A. 144, 145). Copies

of this amended complaint also were made available in the Press Room, but it cannot be determined whether a cover sheet was prepared and distributed along with the amended complaint (App., *infra*, 61–62).

A hearing on the amended complaint was held in New York on August 5, 6, 7, and 10, 1970, before petitioner Bain, the Chief Hearing Examiner of the Department (A. 144). Petitioner Davis, an attorney in the Department's Office of General Counsel (A. 147), appeared as counsel for the complainant (A. 144), and petitioners Fitzpatrick, McMinn,[3] Kirchoff,[4] and Gross presented evidence for the complainant (A. 144–145).[5] In August 1971, the Chief Hearing Examiner filed his recommendation sustaining the administrative complaint (A. 145).

Respondent filed exceptions to the Hearing Examiner's recommended decision, and requested oral argument before the Judicial Officer of the Department, petitioner Campbell, to whom the Secretary had delegated his authority to decide enforcement proceedings under the Commodity Exchange Act (A. 145; see p. 48, *infra*). On January 15, 1973, the Judicial Officer affirmed the Hearing Examiner's decision, and suspended respondent's registration and

---

[3] Petitioner McMinn was the Director of the Eastern Region of the Commodity Exchange Authority (A. 147–148).

[4] Petitioner Kirchhoff was the Deputy Director of the Registration and Audit Division of the Commodity Exchange Authority (A. 146–147).

[5] Petitioner Robinson (the Director of the Compliance Division of the Commodity Exchange Authority (A. 146)) and petitioner Wolkis (see A. 148–149) also collaborated with petitioner Davis in preparing the presentation of the government's case (A. 147).

trading privileges for 90 days (see Decision and Order in CEA Docket No. 167, pp. 11–136, 199).[6]

Respondent filed a petition for review in the United States Court of Appeals for the Second Circuit. In a short, *per curiam* opinion the court of appeals vacated the order of the Judicial Officer on the ground that "the essential finding of willfulness * * * was made in a proceeding instituted without the customary warning letter," which rendered the finding of willfulness "erroneous on the record taken as a whole, and the sanctions imposed unwarranted." *Economou* v. *Department of Agriculture*, 494 F. 2d 519 (C.A. 2); Br. in Opp. 2a–4a.

2. During the pendency of respondent's administrative appeal to the Judicial Officer from the Hearing Examiner's decision, respondent filed the present suit seeking $32 million in damages. The defendants were

[6] A copy of the Judicial Officer's decision and order (which is reported at 32 Agri. Dec. 14) is being lodged with the Clerk of this Court. The Judicial Officer sustained the Hearing Examiner's finding and the allegation in the administrative complaint that respondent's violations of the Act had been willful and thus that no prior notice or opportunity to correct the deficiencies had been necessary before the institution of the enforcement proceedings (Decision and Order, pp. 137–149). See pp. 53–55 *infra*.

The Judicial Officer also found that, although respondent had been registered as a futures commission merchant at the time of the violations, its registration had expired on December 3, 1970 (Decision and Order, p. 11), after the filing of the amended administrative complaint and while the matter was pending before the Hearing Examiner. The Judicial Officer nevertheless determined to order the 90-day suspension of the registration, in order to deter respondent and others from violating the Act (pp. 169–187) and to prevent respondent during that time from again registering (pp. 194-197; see p. 183 n. 116).

the Department of Agriculture and the Commodity Exchange Authority, and all of the petitioners here, except the Judicial Officer, who was added as a defendant in a second amended complaint after he had rendered his decision in the administrative proceeding (A. 156–162).

The second amended complaint alleges principally that the defendants sought to disparage respondent's reputation and ruin his business by wrongfully and maliciously instituting the administrative proceedings against him (A. 159, 161).[7] The complaint alleges that the proceedings were unauthorized because instituted before respondent had been given notice and an opportunity to correct the alleged deficiencies, and that the proceedings should not have been instituted or prosecuted to conclusion since respondent had ceased operating as a futures commission merchant (A. 159). The complaint also alleges that the defendants furnished copies of the administrative complaint to interested persons without also furnishing respondent's answer, and that the defendants issued a false and deceptive press release in connection with the administrative proceedings (A. 158, 160). The complaint suggests that the defendants were motivated to take these actions in retaliation for respondent's

[7] The complaint includes a claim for trespass (A. 161), but the allegations are conclusional (see Pet. App. B, p. 23a–24a n. 1), and peripheral to the principal thrust of respondent's case. The court of appeals did not mention the trespass claim in its description of the complaint (see Pet. App. A, pp. 3a–4a).

outspoken criticism of the regulatory activities of the Authority (A. 157–158, 160).[8]

After respondent twice sought unsuccessfully to enjoin the Department's administrative proceeding (A. 2) and following the court of appeals' vacation of the Judicial Officer's order (see p. 6, *supra*), the defendants moved to dismiss the complaint on the grounds that the individual defendants were immune from suit and that the action against the Department of Agriculture and the Commodity Exchange Authority was barred by sovereign immunity (A. 163). As a part of the defendants' opposition to one of the earlier motions for an injunction, a detailed affidavit had been filed describing the actions taken by the individual defendants in the administrative proceedings that formed the basis of the judicial complaint (A. 142–149; see A. 141).[9] This affidavit was made a part of the defendants' motion to dismiss (A. 163).[10]

On May 22, 1975, the district court dismissed the suit (Pet. App. B, pp. 23a–28a). The court found that the allegedly tortious conduct of the individual defendants was "both within the scope of their authority and discretionary" (Pet. App. B, p. 28a), and on that basis held that they were absolutely immune from

[8] The complaint states that the action is brought, *inter alia*, under 28 U.S.C. 1331, 2201, 2202, "relevant provisions of the Federal Tort Claims Act," 28 U.S.C. 1291, 5 U.S.C. 703, the First and Fifth Amendments, and "such other Constitutional and Federal laws as may be relevant * * *" (A. 156–157).

[9] The details of this affidavit are discussed *infra*, pp. 48–53.

[10] The motion also incorporated the Decision and Order of the Judicial Officer in the administrative proceeding (A. 163, see note 6, *supra*).

suit. The court further held that sovereign immunity barred the suit against the Department of Agriculture and the Commodity Exchange Authority (Pet. App. B, p. 24a).

The court of appeals affirmed the dismissal as to the Department and the Authority but reversed as to the individual defendants (petitioners here) and remanded for further proceedings (Pet. App. A, pp. 1a–22a). The court left undisturbed the findings of the district court and stated (Pet. App. A, p. 8a) that "[h]ad *Barr* [v. *Matteo*, 360 U.S. 564] represented the last word in this evolving area, we might be inclined, as was the district court, to follow it in this case * * *." But the court of appeals, relying largely upon its reading of *Scheuer* v. *Rhodes*, 416 U.S. 232, and *Wood* v. *Strickland*, 420 U.S. 308, concluded (Pet. App. A, p. 20a) that "the individual defendants do not require and are not entitled to absolute immunity * * *." Instead, the court held (*ibid.*) that petitioners could "avail themselves of the defense of qualified 'good faith, reasonable grounds' immunity of the type approved by the Supreme Court in *Scheuer* and *Wood*."

SUMMARY OF ARGUMENT

I. The rule of *Barr* v. *Matteo*, 360 U.S. 564, that federal government officials have absolute immunity from damage suits based upon the performance of their official duties, rests upon the sound considerations that the threat of such suits "might appreci-

226-733—77——2

ably inhibit the fearless, vigorous, and effective administration of policies of government" and that such suits "would consume time and energies which would otherwise be devoted to governmental service" (360 U.S. at 571). "[O]ther sanctions than civil tort suits [are] available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner" (360 U.S. at 576).

The doctrine of absolute immunity for federal executive officials did not originate with *Barr;* it was derived many years before from the immunity traditionally afforded judges, and, by the time *Barr* was decided, "the law * * * was overwhelmingly what the majority held it to be in the Barr case * * *." Davis, *Administrative Law Treatise* § 26.04, pp. 876–877 (1970 Supp.). *Barr* made clear, however, that the existence of absolute immunity depends not upon the rank of the official but upon the nature of the duties performed. Moreover, although *Barr* involved a libel suit, its rationale has not been restricted to such cases. This Court has not given *Barr* such a limited reading, and, relying upon *Barr*, the courts of appeals have applied the doctrine of absolute immunity in a wide variety of circumstances.

In *Doe* v. *McMillan,* 412 U.S. 306, the Court placed a gloss upon the *Barr* principle by ruling that where the government official does not exercise any significant discretion in performing his official duties, he has absolute immunity only to the extent that the official at whose direction he performs those duties would have such immunity had he performed the

duties himself. *Barr* and *McMillan* together thus establish that federal government officials have absolute immunity for acts done in the performance of their official duties in two situations: first, if the duties involve a significant element of discretion, and second, even if the duties are primarily non-discretionary, if the official at whose behest they are performed would have absolute immunity.

The rationale for absolute immunity found persuasive in *Barr* continues to be persuasive today, and the principle of absolute immunity should be continued. Under the absolute immunity doctrine the principal factual inquiry is whether the official was acting within his line of duty—a relatively straightforward and easy determination that allows a termination of the litigation "at the outset" (*Imbler* v. *Pachtman,* 424 U.S. 409, 419 n. 13). Under qualified immunity, however, there is likely to be a wide range of questions concerning the official's motives and intentions, and the reasonableness of his action. Contrary to the court of appeals' view, such questions are not easily resolved on affidavits or on a motion for summary judgment.

As a practical matter, under qualified immunity "[t]he fate of an official * * * depends upon the circumstances and motivations of his actions, as established by the evidence at trial" (*ibid.*). Moreover, it is impossible to be sure how a jury would react to such evidence. An official "may * * * find himself hard put to it to satisfy a jury of his good faith," and thus even the blameless official who is sued would often

be subjected "to the burden of a trial and to the inevitable danger of its outcome" (*Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949).

It is easy for persons who believe they have been unfairly treated by government officials to charge that those officials acted "maliciously" in performing their duties. It is the threat of such claims that is likely "appreciably [to] inhibit the fearless, vigorous, and effective administration of policies of government" (*Barr* v. *Matteo, supra,* 360 U.S. at 571). For these reasons, it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation" (*Gregoire* v. *Biddle, supra,* 177 F. 2d at 581).

Contrary to the view of the court of appeals, this Court's recent decisions in *Scheuer* v. *Rhodes,* 416 U.S. 232, and *Wood* v. *Strickland,* 420 U.S. 308, holding that certain state officials sued for damages under 42 U.S.C. 1983 have only qualified immunity, do not undermine the reasoning of *Barr* v. *Matteo* and do not warrant curtailment of the absolute immunity of federal officials. *Scheuer* and *Wood* rest in large part upon the Court's conclusion that a general grant of absolute immunity to state officials sued under 42 U.S.C. 1983 would be inconsistent with Congress' intention to subject such officials to damage suits under this statute. Moreover, in providing only qualified immunity for state officials, the Court has given weight to the fact that at state common law those officials have a qualified rather than an absolute immunity.

That reasoning is inapplicable to the present case, which deals with the long-standing rule of immunity for federal officials under federal law (*Howard* v. *Lyons,* 360 U.S. 593), and in which the continuation of absolute immunity would not be inconsistent with any federal statute. *Scheuer* and *Wood* do not invalidate the conclusion in *Barr* v. *Matteo* that absolute immunity is necessary "to aid in the effective functioning of government" (360 U.S. at 573). In *Imbler* v. *Pachtman, supra,* where the Court held that a state prosecutor sued for damages under 42 U.S.C. 1983 has absolute immunity, the Court again recognized the important role that that principle plays in the effective conduct of governmental business.

II. Federal officials engaged in enforcing regulatory legislation by initiating, conducting or deciding administrative proceedings necessarily have substantial discretion, the exercise of which would be influenced detrimentally by the threat of personal liability and litigation. Such proceedings frequently involve complex as well as important and hotly contested issues, and damage suits in retaliation against the officials responsible for bringing and deciding them "could be expected with some frequency * * *" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 425).

This case is based upon the initiation, prosecution, and adjudication of an administrative enforcement proceeding under the Commodity Exchange Act, a statute providing a comprehensive regulatory scheme for trading in "futures" of specified commodities.

The Act gives the Secretary of Agriculture broad investigative and enforcement authority, which he in turn has delegated to other officials in the Department. All of the petitioners' actions upon which respondent's complaint is based were taken under this regulatory scheme in the performance of their official duties. Moreover, the actions either involved the exercise of substantial discretion or were done at the behest of superior officers who themselves would have had absolute immunity had they taken the actions themselves.

The fact that the court of appeals ultimately overturned the administrative order does not indicate that petitioners were acting outside the scope of their authority in this case. The applicable statutes and regulations authorize the actions taken by petitioners in the circumstances found by them to have existed in respondent's case. It was therefore within the scope of petitioners' discretionary authority to initiate, conduct, and decide the enforcement action as they did.

The fact that some of the claims in this case allege that petitioners' actions violated respondent's constitutional rights does not require that petitioners' immunity be only a qualified one. The conflicting public and private interests that the Court weighed in *Barr* v. *Matteo* should not be differently evaluated because the complaint is framed in constitutional rather than common law terms. Here, respondent's suit is essentially for "defamation and kindred torts" (*i.e.*, malicious prosecution), for which *Barr* held that federal

officials have absolute immunity (360 U.S. at 569), and the basic character of the claim cannot be changed by the form in which the pleading is drafted.

ARGUMENT

Almost 20 years ago in *Barr* v. *Matteo,* 360 U.S. 564, this Court held that a federal government official had an absolute rather than a qualified immunity from a suit for damages challenging an action taken by him in the performance of his official duties. Although there was no opinion of the Court, Mr. Justice Stewart in dissent described Mr. Justice Harlan's plurality opinion (for 4 members of the Court) as containing "a lucid and persuasive analysis of the principles that should guide decision in this troublesome area of law" (360 U.S. at 592). Mr. Justice Stewart's disagreement with the plurality opinion was only "in the application of these principles to the facts of the present case" (*ibid.*). In the companion case of *Howard* v. *Lyons,* 360 U.S. 593, Mr. Justice Stewart concurred in the opinion of the Court, which on the authority of *Barr* recognized absolute immunity for a government official's action taken "in the discharge of [his] * * * official duties * * *" (360 U.S. at 598). A majority of the Court in *Barr* and *Howard* thus recognized the absolute immunity doctrine for federal officials.

In two subsequent decisions this Court has held that state officials sued for damages under the Civil Rights Act of 1871, 17 Stat. 13 (42 U.S.C. 1983), for actions taken as part of their official duties had only a quali-

fied and not an absolute immunity, *i.e.*, that they have immunity only if their official actions were taken in good faith and with a reasonable basis. *Scheuer* v. *Rhodes,* 416 U.S. 232; *Wood* v. *Strickland,* 420 U.S. 308.

On the authority of *Barr* v. *Matteo,* the district court in this case dismissed a damage suit against petitioners—all federal officials—based upon their actions in initiating, conducting, and deciding an administrative enforcement proceeding under the Commodity Exchange Act. The court of appeals, although apparently recognizing that under *Barr* dismissal of the suit was required (Pet. App. A, p. 8a), concluded that the Court's subsequent decisions had so undermined *Barr* that petitioners have only a qualified and not an absolute immunity (Pet. App. A, pp. 8a–16, 20a).

The issue before the Court, therefore, is whether the doctrine of absolute immunity set forth in *Barr* is to be continued, or whether a qualified immunity is adequate to protect federal officials in the performance of their duties. In Point I of this brief, we shall show that the reasons that led the Court in *Barr* to conclude that absolute immunity was necessary for the proper functioning of the federal government are just as compelling today as when *Barr* was decided, and that the Court's subsequent decisions providing only a qualified immunity for state officials sued under 42 U.S.C. 1983 do not undermine the holding or reasoning of *Barr*. In Point II we shall show that under the principle of absolute immunity, none of the petitioners is subject to suit for his action in instituting, conducting, or deciding the administrative enforcement proceeding.

I

THE RULE THAT FEDERAL GOVERNMENT OFFICIALS HAVE ABSOLUTE IMMUNITY FROM DAMAGE SUITS BASED UPON THE PERFORMANCE OF THEIR OFFICIAL DUTIES RESTS UPON SOUND PUBLIC POLICY CONSIDERATIONS AND SHOULD BE REAFFIRMED

A. THE ABSOLUTE IMMUNITY OF FEDERAL OFFICIALS RECOGNIZED IN *BARR* V. *MATTEO* RESTS UPON SOUND PUBLIC POLICY CONSIDERATIONS

The absolute immunity of federal officials "is not a badge or emolument of exalted office, but is an expression of a policy designed to aid in the effective functioning of government" (*Barr* v. *Matteo, supra,* 360 U.S. at 572–573). The rationale of the immunity is that it is "important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government" (360 U.S. at 571). As Judge Learned Hand explained, in a famous passage quoted with approval in *Barr* (360 U.S. at 571):

> It does indeed go without saying that an official, who is in fact guilty of using his powers

to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. * * *

The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official

> powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him * * *. [*Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949.]

Barr plowed no new ground.[11] The Court there relied upon its earlier decision in *Spalding* v. *Vilas*, 161 U.S. 483, in which in 1895 it held that the Postmaster General was absolutely immune from suit for damages for allegedly malicious defamation and interfer-

[11] Indeed, "the law before the Barr decision was overwhelmingly what the majority held it to be in the Barr case * * *." Davis, *Administrative Law Treatise* § 26.04, pp. 876–877 (1970 Supp.). In addition to the cases discussed in the text, see, *e.g.*, *Adair* v. *Bank of America National Trust and Savings Assn.*, 303 U.S. 350; *Taylor* v. *Glotfelty*, 201 F. 2d 51 (C.A. 6); *Papagianakis* v. *The Samos*, 186 F. 2d 257 (C.A. 4), certiorari denied, 341 U.S. 921; *Gibson* v. *Reynolds*, 172 F. 2d 95 (C.A. 8), certiorari denied, 337 U.S. 925; *Laughlen* v. *Rosenman*, 163 F. 2d 838 (C.A.D.C.); *Jones* v. *Kennedy*, 121 F. 2d 40 (C.A.D.C.), certiorari denied, 314 U.S. 665; *Glass* v. *Ickes*, 117 F. 2d 273 (C.A.D.C.), certiorari denied, 311 U.S. 718; *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A.D.C.); *Lang* v. *Wood*, 92 F. 2d 211 (C.A.D.C.), certiorari denied, 302 U.S. 686; *Standard Nut Margarine* v. *Mellon*, 72 F. 2d 557 (C.A.D.C.), certiorari denied, 293 U.S. 605.

ence with contractual relationships. "In exercising the functions of his office," the Court said, "the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs * * *" (161 U.S. at 498).

Spalding, in turn, relied upon *Bradley* v. *Fisher,* 13 Wall. 335, where "[t]his Court early held that judges of courts of superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed" (*Barr* v. *Matteo, supra,* 360 U.S. at 569). In *Bradley,* the Court had explained that "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself" (13 Wall. at 347). The Court in Spalding determined that "the same general considerations of public policy" that underlie the doctrine of judicial immunity also require absolute immunity for executive officials "engaged in the discharge of duties imposed upon them by law" (161 U.S. at 498). See also *Yaselli* v. *Goff,* 275 U.S. 503, affirming *per curiam,* 12 F. 2d 396 (C.A. 2.).

Barr made clear that the existence of absolute immunity depends not upon the rank of the official but upon the nature of the duties performed. "It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' *Spalding* v. *Vilas, supra,* at 498—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits" (360 U.S. at 573–574). "The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy" (360 U.S. at 573; footnote omitted). "[T]o hold that only the heads of departments should be immune * * * under the rule would defeat its purpose. * * * When the act done occurs in the course of [a subordinate] official['s] duty, * * * it is the official action of the department; and the same reason for immunity applies as if it had been performed by the superior officer himself." *Cooper* v. *O'Connor,* 99 F. 2d 135, 142 (C.A.D.C.).

Barr and its companion *Howard* thus recognized the principle that government officials have an abso-

lute immunity from suit for damages based upon actions taken in the performance of their official duties. Although *Barr* was a libel suit,[12] the rationale upon which it established absolute immunity is not limited to that type of action but is equally applicable to all actions for damages based upon federal officials' performance of their duties. This Court has not treated *Barr* as covering only libel actions, but has viewed it more broadly as establishing absolute immunity for federal officials from whom damages are sought as a result of their official actions. See *Doe* v. *McMillan,* 412 U.S. 306, 318–320, 322–323; *Scheuer* v. *Rhodes,* 416 U.S. 232, 247.

Similarly, the lower federal courts have not restricted the absolute immunity announced in *Barr* to defamation suits. Following *Barr,* the courts of appeals have applied the doctrine of absolute immunity to a wide variety of actions taken by federal officials as part of their official duties.[13]

[12] *Barr* applied the absolute immunity principle to a suit based upon the issuance of a libelous press release by the Acting Director of the Office of Rent Stabilization. The court ruled that it was "[a]n appropriate exercise of the discretion with which an executive officer of petitioner's rank is necessarily clothed to publish the press release here at issue in the circumstances disclosed by this record" (360 U.S. at 574; see also *id.* at 575).

[13] As the court of appeals said in *Norton* v. *McShane,* 332 F. 2d 855, 858 n. 3 (C.A. 5), certiorari denied, 380 U.S. 981: "Although *Barr* v. *Matteo* involved a suit based on defamation, the majority opinion clearly implies that the rules of law expressed therein apply to civil tort suits generally; and the opinion has been so construed in subsequent cases." See, *e.g., Berberian* v. *Gibney,* 514 F. 2d 790 (C.A. 1); *Mandel* v. *Nouse,* 509 F. 2d 1031 (C.A. 6),

In *Doe* v. *McMillan, supra,* however, the Court placed a gloss upon the *Barr* principle by ruling that where the government official does not exercise any significant discretion in performing his official duties, he has absolute immunity only to the extent that the official at whose direction he performs those duties would have such immunity had he performed the duties himself. The Court in *McMillan* held that on the record before it official immunity did not bar a suit for damages against the Public Printer and the Superintendent of Documents based upon their printing and distribution of a Report of a Committee of the House of Representatives.[14] Although recognizing that the printing and distribution of the Report "would be 'within the outer perimeter' of the statutory duties of the Public Printer and the Superintendent of Documents," the Court held that absolute immunity does not "automatically attach to any conduct expressly or impliedly authorized by law" (412 U.S. at 322).

certiorari denied, 422 U.S. 1008; *Peterson* v. *Weinberger,* 508 F. 2d 45 (C.A. 5), certiorari denied, 423 U.S. 830; *Ruderer* v. *Meyer,* 413 F. 2d 175 (C.A. 8), certiorari denied, 396 U.S. 936; *David* v. *Cohen,* 407 F. 2d 1268 (C.A.D.C.); *Heine* v. *Raus,* 399 F. 2d 785 (C.A. 4); *Wozencraft* v. *Captiva,* 314 F. 2d 288 (C.A. 5); *Ove Gustavsson Contracting Co.* v. *Floete,* 299 F. 2d 655 (C.A. 2), certiorari denied, 374 U.S. 827; *Poss* v. *Lieberman,* 299 F. 2d 358 (C.A. 2), certiorari denied, 370 U.S. 944; *Sauber* v. *Gliedman,* 283 F. 2d 941 (C.A. 7), certiorari denied, 366 U.S. 906.

[14] The court of appeals had held that the suit was barred by "the official immunity doctrine recognized in *Barr* v. *Matteo*" (412 U.S. at 310).

The Court noted that the "Government Printing Office acts as a service organization for the branches of the Government," and that the Public Printer and Superintendent of Documents "exercise discretion only with respect to estimating the demand for particular documents and adjusting the supply accordingly" (412 U.S. at 322–323). It held that although the Government Printing Office "is independently created and manned and invested with its own statutory duties," it had no "independent immunity" but was immune only "to the extent that the department head himself would be immune if he ran his own printing press and distributed his own documents" (412 U.S. at 323; see also *id.* at 342 (dissenting opinion of Mr. Justice Rehnquist)).

The Court concluded that although the members of Congress were immune under the Speech or Debate Clause "for ordering or voting for a publication going beyond the reasonable requirements of the legislative function," legislative aides did not have a similar immunity for "carrying out such nonlegislative directions" (412 U.S. at 315), and that "the Public Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors" (412 U.S. at 324).

Barr and *McMillan* together thus establish that federal government officials have absolute immunity for acts done in the performance of their official duties

in two situations. First, the official is immune if the duties involved a significant element of discretion, *i.e.*, if "the function itself was of such a discretionary nature that the threat of litigation would impede the official to whom it was assigned" (*David* v. *Cohen*, 407 F. 2d 1268, 1272 (C.A.D.C.)). This is a standard that "reflects the purpose for which immunity is granted * * * to ensure that important decisions are made free from the fear of personal liability or harassing suits" *Johnson* v. *Alldredge,* 488 F. 2d 820, 824 (C.A. 3), certiorari denied *sub nom. Cronrath* v. *Johnson,* 419 U.S. 882)."[15]

Second, the official is immune even if the duties are primarily ministerial and non-discretionary, if the official at whose behest they are performed would have absolute immunity had he performed them himself. This standard gives proper recognition to the fact that governmental functions do not become "less important simply because they are exercised by officers of lower rank in the executive hierarchy" (*Barr* v. *Matteo, supra,* 360 U.S. at 573). "If * * * recognition of an absolute privilege for judges, legislators and highly placed executive officers of the government, when acting in line of duty, is to serve its intended purpose, it must extend to subordinate officials * * * who exe-

[15] The Second Circuit stated the test as follows: "[I]s the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?" (*Ove Gustavsson Contracting Co.* v. *Floete*, 299 F. 2d 655, 659 (C.A. 2), certiorari denied, 374 U.S. 827).

cute the official's orders" (*Heine* v. *Raus,* 399 F. 2d 785, 790 (C.A. 4); see *Berndtson* v. *Lewis,* 465 F. 2d 706 (C.A. 4); *Cooper* v. *O'Connor, supra,* 99 F. 2d at 142; *Grossman* v. *McKay,* 384 F. Supp. 99 (D. Md.)). But see *Johnson* v. *Alldredge, supra.*

B. THE RATIONALE UPON WHICH THE COURT IN *BARR* CONCLUDED THAT ABSOLUTE IMMUNITY IS NECESSARY IS AS COMPELLING TODAY AS WHEN THE CASE WAS DECIDED, AND THE PRINCIPLE OF ABSOLUTE IMMUNITY SHOULD BE CONTINUED

1. The principal inquiry in determining whether a federal official is entitled to absolute immunity is whether the actions upon which the suit is based were done as a part of his official duties.[16] In *Bradley* v. *Fisher, supra,* 13 Wall. 351–352, the Court said in the case of judicial immunity that "[w]here there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." "As in the case of a judicial officer," the Court in *Spalding* v. *Vilas, supra,* 161 U.S. at 498, recognized a distinction, for the purposes of immunity for executive officials, between "action taken * * * in reference to matters which are manifestly or palpably beyond [the official's] authority, and action having more or less connection with the general matters committed by

[16] The courts "have * * * always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers * * *." *Gregoire* v. *Biddle, supra,* 177 F. 2d at 581.

law to his control or supervision."[17] In *Barr* v. *Matteo, supra,* 360 U.S. at 575, the Court rested its granting of absolute immunity on "[t]he fact that the action here taken was within the outer perimeter of petitioner's line of duty * * *."

An official otherwise entitled to absolute immunity does not lose it because of allegations that he acted maliciously or unreasonably. *Gregoire* v. *Biddle, supra,* 177 F. 2d at 581. Absolute immunity prevents having liability turn upon "any consideration of the motives with which the acts are done." *Bradley* v. *Fisher, supra,* 13 Wall. at 354. Nor is the immunity destroyed by a claim that the official acted erroneously in a particular case, as long as the official was acting pursuant to his duties as a government officer.

Since the determination whether the official's actions were part of his duties turns upon objective criteria that do not involve motive or intent, the existence of absolute immunity ordinarily can be easily shown. Usually a court can make such a determination on the basis of affidavits describing the authority of the official and the precise actions taken in exercising that authority. That was the procedure followed in this case, where the government filed affidavits (A. 141–149) describing the functions of each of the defendants and showing why their actions were part of their official duties. See Point II, *infra.*

[17] The Court found that the action of the Postmaster General giving rise to the suit in *Spalding* "was not unauthorized by law, nor beyond the scope of his official duty" (161 U.S. at 493).

The principle of absolute immunity thus permits the courts to dispose of these cases expeditiously—ordinarily on the basis of a motion to dismiss or for summary judgment—and to avoid the protracted litigation "which would consume time and energies which would otherwise be devoted to governmental service" (*Barr* v. *Matteo, supra,* 360 U.S. at 571). See *Imbler* v. *Pachtman,* 424 U.S. 409, 419 n. 13.

In contrast, the defense of qualified immunity is likely to open up a wide range of questions concerning the official's motives and intent in performing his duties.[18] Did he really have a good faith belief that he was justified in taking action, or was the official action taken in bad faith, merely as a pretext for retaliating against the plaintiff? What were his reasons for deciding to act as he did? Did he take similar actions against others similarly situated? What did he hope to accomplish by his actions? These and similar questions frequently would result in a sweeping probe of the official's mental processes and intentions.

Such an inquiry undoubtedly would entail broad discovery that could consume substantial time of fed-

[18] The Court explained the scope of the qualified immunity in *Scheuer* v. *Rhodes* as follows (416 U.S. at 247–248):

> * * * in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action in which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

eral officials—both the defendants and their colleagues who might be able to shed light upon their actions. Unlike the narrow inquiry under the absolute immunity doctrine whether the government official's actions were part of his official duties, the broad-ranging issues under a qualified immunity standard normally are not susceptible of determination on the basis of affidavits, but would require testimony and cross-examination. As this Court explained recently, in holding that prosecutors have absolute immunity for actions done as part of their official duties, under qualified immunity "[t]he fate of an official * * * depends upon the circumstances and motivations of his actions, as established by the evidence at trial" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 419 n. 13).

Moreover, it is impossible to predict with any certainty how a jury would react to such evidence. Mistakes in judgment or legal errors may, because of the surrounding circumstances, appear to involve an unjustified persecution of or campaign against the plaintiff, and lead the jury to render a substantial personal judgment against government officials who were only attempting to do their duty as they saw it. An official "may * * * find himself hard put to it to satisfy a jury of his good faith," and thus even the blameless official who is sued would often be subjected "to the burden of a trial and to the inevitable danger of its outcome" (*Gregoire* v. *Biddle, supra,* 177 F. 2d at 581).

Because of the doubts and uncertainties about the consequences under qualified immunity of acting in a

close or sensitive matter, government officials are likely to allow the possibility of substantial personal liability or, at least, significant burdens in defending a law suit, to influence their judgment in performing their duties. A government official who realizes that his decision to act against a particular individual may subject him to suit and substantial personal liability, is likely to let that consideration color his judgment. An official inevitably would "find it difficult honestly and independently" to do his work "if he knew that * * * unfavorable [action], coupled with an allegation of * * * malice, could subject him * * * to possible personal liability, as a result of which he might lose his home, his automobile, his savings and whatever other property, real or personal, he might possess." *Ove Gustavsson Contracting Co.* v. *Floete, supra,* 299 F. 2d at 658.

The situation is exacerbated because people who believe that the government is persecuting them will not hesitate to make serious charges against the officials they consider responsible for their predicament. It is easy for persons who think that government officials have treated them unfairly to charge that those officials acted "maliciously" in performing their duties. "Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 425).

In sum, a qualified immunity would be inadequate to accomplish the basic purpose of the official immu-

nity doctrine itself to insure that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government" (*Barr* v. *Matteo, supra,* 360 U.S. at 571).

2. The court of appeals suggested (Pet. App. A, pp. 21a–22a) that under the qualified immunity doctrine cases that have no merit could be expeditiously disposed of on summary judgment. But even summary judgment might entail extensive and time consuming discovery. Moreover, as we have shown (*supra,* pp. 28–29), many and perhaps most of the cases would require a more searching analysis of the defendant's motives and intent than can effectively be made under the summary judgment procedure. In considering a motion for summary judgment, the court must resolve all ambiguities and draw all favorable inferences in favor of the party against whom summary judgment is sought (*United States* v. *Diebold, Inc.,* 369 U.S. 654, 655), and the burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute (*Adickes* v. *Kress & Co.,* 398 U.S. 144, 157). See Rule 56(c), Fed. R. Civ. P. Since under the qualified immunity standard the motives and intent of the official are

key elements of his ultimate liability,[19] courts would be reluctant to decide them against the plaintiff prior to trial, thereby foreclosing the plaintiff's right to prove his case.

The court of appeals' reasoning rejects the fundamental philosophy upon which the absolute immunity doctrine rests. The court stated (Pet. App. A, pp. 20a–21a; footnote omitted):

> If, indeed, the plaintiff has evidence to the effect that the proceedings against him were instituted and prosecuted maliciously and without reasonable grounds, or that the defendants knowingly caused the defamatory press releases to be issued regarding him or his company, the policy against abuse of official power requires that he be given an opportunity to prove his claim. If, on the other hand, the plaintiff's claims are baseless, as defendants maintain, our holding does not necessarily require them to face an expensive, protracted or wasteful trial.

But the rationale of the official immunity doctrine is that it is "better to leave unredressed the wrongs

[19] In *Pierson* v. *Ray*, 386 U.S. 547, 555–557, the Court treated the determinations of "good faith and probable cause" not as elements of an immunity, but as an affirmative defense to liability. See also *Bivens* v. *Six Unknown Named Agents*, 453 F. 2d 1339, 1341, 1347–1348 (C.A. 2). Although the Court in *Scheuer* v. *Rhodes*, *supra*, expanded upon the standard set forth in *Pierson* and described it as a "qualified immunity" (see note 18, *supra*), the Court nevertheless has recognized that the standard is not an immunity from trial but a defense to liability. See *Scheuer* v. *Rhodes*, *supra*, 416 U.S. at 243; *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 419 n. 13.

done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation * * *" (*Gregoire* v. *Biddle*, *supra*, 177 F. 2d 581). The doctrine recognizes that there may be instances in which the existence of the immunity precludes recovery on meritorious claims—such as where the proceedings "were instituted and prosecuted maliciously and without reasonable cause" or where "defamatory press releases" were issued (as in *Barr*). It reflects the judgment that on balance the public interest is best served by denying recovery in such cases in order "to aid in the effective functioning of government" (*Barr* v. *Matteo*, *supra*, 360 U.S. at 573). "To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good" (360 U.S. at 576).

3. The court of appeals also stated (Pet. App. A, p. 16a) that damage suits "frequently serve the public interest by deterring official misconduct * * *." But "other sanctions than civil tort suits [are] available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner" (*Barr* v. *Matteo*, *supra*, 360 U.S. at 576).

Federal officials know that they are subject to censure or to discharge from their jobs if they act unreasonably or improperly. Because the conduct of

members of the executive branch of the government is scrutinized not only by supervisors and superiors but also by Congress, the press and the public, misconduct by government employees is unlikely to go undetected or unpunished. Moreover, many actions by federal officials, like the action that gave rise to this lawsuit, are subject to review and correction by courts in suits under the Administrative Procedure Act and other statutory review provisions.

Finally, the immunity does not bar criminal prosecution of government officials who violate the law. "This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 429).

In determining the immunity of federal officials, recent instances of serious abuse of their authority by some of those officials cannot be ignored. Indeed, at first blush, it might seem contrary to the public interest to deny recovery to the victims of those misdeeds by giving those officials absolute immunity. Of course, some of the misdeeds may have been so excessive or gross that they cannot be deemed to have been done "within the scope of [the official's] powers" (*Gregoire* v. *Biddle, supra,* 177 F. 2d at 581). In any event, the doctrine has always recognized that its application may result in denial of recovery in

some cases where citizens have been injured as a result of official's improper conduct.

Immunity is given because, on balance, "the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities" is deemed to outweigh "the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government" (*Barr* v. *Matteo, supra,* 360 U.S. at 565). The fact that there may have been some particularly egregious misuse of government authority in recent years does not justify jettisoning the salutary principle of official immunity, which has been adopted in the public interest to further the efficient functioning of the entire federal government.

C. THIS COURT'S RECENT DECISIONS HOLDING THAT STATE OFFICIALS SUED FOR DAMAGES UNDER 42 U.S.C. 1983 HAVE ONLY QUALIFIED IMMUNITY DO NOT REQUIRE OR WARRANT A SIMILARLY LIMITED IMMUNITY FOR FEDERAL OFFICIALS

Two recent decisions of this Court held that certain state officials sued under 42 U.S.C. 1983 for damages based upon the performance of their official duties have only a qualified rather than an absolute immunity. *Scheuer* v. *Rhodes, supra* (governor and other state officials); *Wood* v. *Strickland, supra*

(school administrators and school board members); cf. *Imbler* v. *Pachtman, supra,* 424 U.S. at 419; *Pierson* v. *Ray, supra.*[20] As noted, the court of appeals here stated that "[h]ad *Barr* represented the last word in this evolving area, we might be inclined, as was the district court, to follow it in this case * * *" (Pet. App. A, p. 8a). It concluded, however, on the basis of the "principles" it believed this Court had developed in *Pierson, Scheuer, Wood* and *Imbler* (Pet. App. A, pp. 8a–20a), that petitioners "and the performance of their executive duties are adequately protected by permitting them to avail themselves of the defense of qualified 'good faith, reasonable grounds' immunity of the type approved by the Supreme Court in *Scheuer* and *Wood*" (Pet. App. A. p. 20a; footnote omitted).

Contrary to the view of the court of appeals, this Court's recent decisions under 42 U.S.C. 1983 do not undermine the reasoning of *Barr* v. *Matteo* and do not warrant curtailment of the absolute immunity of federal officials. Those decisions do not invalidate the conclusion in *Barr* v. *Matteo* that absolute immunity for federal officials is necessary "to aid in the effective

[20] *Pierson* held that in a suit for damages under 42 U.S.C. 1983 against a judge and police officers, the former had absolute immunity but the police officers had only an affirmative defense of "good faith and probable cause" (386 U.S. at 555–557; see note 19, *supra*). The rationale of the latter ruling, however, was not that such a defense adequately protected the police officers, but that "the common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one" (386 U.S. at 555). See also *Bivens* v. *Six Unknown Named Agents*, 456 F. 2d 1339 (C.A. 2).

functioning of government," in order that "the public service [may] function effectively" (360 U.S. at 573, 575). *Scheuer* and *Wood* are not based upon the view that only the more limited immunity is necessary to enable government officials to function effectively. Instead, they rest in large part upon the Court's conclusion that a general grant of absolute immunity to state officials sued under 42 U.S.C. 1983 would be inconsistent with Congress' intention in enacting that provision to subject such officials to damage suits.

Section 1983 makes liable in an action for damages "[e]very person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State," deprives any person of "any rights, privileges, or immunities secured by the Constitution and laws." Noting that in *Monroe* v. *Pape,* 365 U.S. 167, 172, the Court had said that that section was intended " 'to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position' " (416 U.S. at 243),[21] the Court in

[21] See, also, *District of Columbia* v. *Carter*, 409 U.S. 418, where the Court explained that Section 1983 had been "designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others" (409 U.S. at 426). "To the Reconstruction Congress, the need for some form of federal intervention was clear," but "[i]t was equally clear" that Congress could not itself "exert any direct control, on a day-to-day basis, over the actions of state officials" (409 U.S. at 427). Congress therefore chose "to involve the federal judiciary" (*ibid.*), as a means of providing "at least indirect federal control over the unconstitutional actions of state officials" (409 U.S. at 428).

Scheuer reasoned that "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under [the] terms" of 42 U.S.C. 1983, because "[u]nder the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have [absolute immunity]" (416 U.S. at 243, 248).

As Mr. Justice White pointed out in his concurring opinion in *Imbler* v. *Pachtman, supra,* 424 U.S. at 433–434: "It is manifest * * * that all state officials as a class cannot be immune absolutely from damage suits under 42 U.S.C. § 1983 and that to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create. * * * Thus, * * * the Court has not extended *absolute* immunity to such officials in the absence of the most convincing showing that the immunity is necessary" (emphasis in original). Similarly, in *Wood* v. *Strickland, supra,* 420 U.S. at 322, the Court recognized that the extension of absolute immunity to the state officials in that case would "deny much of the promise of § 1983."

To give state officials generally absolute immunity from suits under 42 U.S.C. 1983 would be to deny to the victims of their misconduct the very right of recovery that Congress intended to provide. The Court therefore has recognized absolute immunity under that statute only in limited circumstances, *e.g.*, in the

case of judges (*Pierson* v. *Ray, supra*) and prosecutors (*Imbler* v. *Pachtman, supra*), where the Court has "concluded that immunities 'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of § 1983" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 418, quoting from *Tenney* v. *Brandhove,* 341 U.S. 367, 376).

In providing only qualified immunity for other state officials, moreover, the Court has given considerable weight to the fact that at state common law those officials have a qualified rather than an absolute immunity. *Pierson* v. *Ray, supra,* 386 U.S. at 555; *Wood* v. *Strickland, supra,* 420 U.S. at 318. In *Imbler* v. *Pachtman, supra,* 424 U.S. 419, the Court pointed out that "[i]n *Scheuer* and in *Wood* * * * the considerations underlying the nature of the immunity of the respective officials in suits at common law led to essentially the same immunity under § 1983."

In contrast, the immunity of federal officials is defined by reference to federal law (*Howard* v. *Lyons, supra,* 360 U.S. at 587), and, as we have shown (*supra,* pp. 17–26), those officials traditionally have been given absolute immunity.

More important, continued recognition of that absolute immunity would not violate or weaken any rights Congress had created to sue federal officials for damages. Congress has not provided a right of action against federal officials comparable to that it

provided against state officials in 42 U.S.C. 1983.[22] Thus, in this case, unlike *Scheuer* and *Wood,* the Court does not have to "take into account" (see 416 U.S. at 243) a legislative enactment that is inconsistent with absolute immunity.

The Court in *Scheuer* recognized that it was dealing only with state officials: it stated that the case in its then posture "present[ed] no occasion for a definitive exploration of the scope of immunity available to *state* executive officials" (416 U.S. at 249; emphasis added). The Court also stated, in quoting with approval from *Barr* v. *Matteo,* that that case arose "[i]n a context other than a § 1983 suit" (416 U.S. at 247).

In sum, this Court's decisions defining the immunity of state officials sued under 42 U.S.C. 1983 do not reject the basic rationale of *Barr* v. *Matteo,* or suggest that it is no longer valid. To the contrary, in holding in *Pierson* and *Imbler* that state judges and prosecutors continue to have absolute immunity in suits under that section, the Court again recognized the important role that absolute immunity plays in

[22] In *District of Columbia* v. *Carter, supra,* 409 U.S. at 429–430, the Court explained that "the rationale underlying Congress' decision not to enact legislation similar to § 1983 with respect to federal officials [was] the assumption that the Federal Government could keep its own officers under control * * *." Although Congress determined that involving federal courts in the trial of damage actions against state officials was a necessary means of obtaining "indirect federal control over unconstitutional actions of state officials" (409 U.S. at 428), Congress' failure to enact similar legislation with respect to federal officials indicates that it was satisfied that such a measure was unnecessary to insure that misconduct by federal officials would be kept in check.

the effective conduct of governmental business. The Court provided only qualified immunity in *Scheuer* and *Wood* because it considered that that would be consistent with state common law and that the broad immunity would be inconsistent with the remedy Congress had created in 42 U.S.C. 1983. That reasoning is inapplicable to the present case, which deals with the immunity of federal officials under federal law (an immunity that "has in large part been of judicial making" (*Barr* v. *Matteo, supra,* 360 U.S. at 569)), and in which the continuation of absolute immunity would not be inconsistent with any federal statute.

Although we believe that government officials generally have absolute immunity for acts done in the performance of their official duties (subject to the conditions discussed above), the Court can reverse the judgment of the court of appeals without precisely defining the contours of the doctrine. For, as we now show, at least with respect to the functions they performed in this case—initiating, conducting and deciding an administrative enforcement proceeding—petitioners have absolute immunity.

II

UNDER THE DOCTRINE OF ABSOLUTE IMMUNITY, THE DISTRICT COURT PROPERLY DISMISSED THIS SUIT AGAINST ALL THE PETITIONERS

If the Court agrees with our submission that the doctrine of absolute immunity for federal govern-

ment officials should be reaffirmed, its normal practice would be to remand this case to the court of appeals to apply that standard to the petitioners. We believe, however, that the record in this case establishes that under the principle of absolute immunity the district court correctly dismissed the suit against all the petitioners. The complaint is based upon petitioners' actions in connection with the initiation, prosecution, and adjudication of an administrative enforcement proceeding under the Commodity Exchange Act. The record shows that all those actions were taken as part of petitioners' official duties, and that they either involved the exercise of significant discretion or were taken at the behest of superior officials who would have been absolutely immune if they personally had taken the actions.

In these circumstances, the Court may deem it appropriate itself to apply the absolute immunity standard to these petitioners and "terminate" "the litigation * * * now" (*O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504–508; *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 621).

1. To put the matter in context, we stress initially the importance of absolute immunity for federal officials engaged in enforcing regulatory legislation. Government officials having such responsibility regularly and frequently are required to decide whether to initiate an investigation, and, if one is undertaken, whether to bring an enforcement proceeding on the basis of the facts developed in that probe. In conducting the investigation, they must determine the scope and methods of the probe and draw inferences from the facts disclosed. If a formal proceeding is brought, the lawyer trying the case must decide what evidence to introduce, what legal theories to urge, and what sanctions to seek. The individual deciding the case—the administrative judge—must evaluate the record before him, apply the law as he understands it, and frame a remedial order.

All of these functions necessarily involve the exercise of substantial discretion, frequently with respect to sensitive and controversial matters. Each "function itself [is] of such discretionary nature that the threat of litigation would impede the official to whom it was assigned" (*David* v. *Cohen, supra,* 407 F. 2d at 1272).[23] As in the case of judges, the need for absolute immunity for administrative law judges stems in large part from the practical consideration that the nature of the adjudicatory function—the resolution of controversies, some of which involve large personal or financial stakes as well as difficult legal and fac-

[23] See *Ove Gustavsson Contracting Co.* v. *Floete, supra,* 299 F. 2d at 659. There the court pointed out, with reference to an official responsible for monitoring the performance of government contracts: "It is much more than a mere possibility that many would be unable freely and honestly to perform their duties if they knew they might be subjected to the risk of trial and personal liability based on an unfavorable report which the ousted contractor might find easy to claim was 'false,' and hence 'malicious.'" See also *Peterson* v. *Weinberger,* 508 F. 2d 45 (C.A. 5); *Jones* v. *Kennedy, supra; White* v. *Joegerman,* 391 F. Supp. 438 (S.D. N.Y.).

tual questions—makes the adjudicator a likely and vulnerable target for attack by individuals who believe he has treated them improperly. See *Bradley* v. *Fisher, supra,* 13 Wall. at 348; *Pierson* v. *Ray, supra,* 356 U.S. at 554. Like a criminal prosecutor, an official responsible for enforcing a regulatory statute "is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them [before the agency]" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 424). Damage suits based upon such actions "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the [government's] advocate" (424 U.S. at 425).

Absolute immunity for government officials initiating, conducting and deciding administrative enforcement proceedings thus is justified, as it is for judges and prosecutors, by "concern that harassment by unfounded litigation" and the "substantial danger of liability" "would cause a deflection of the [officials'] energies from [their] public duties, and the possibility that [they] would shade [their] decisions instead of exercising the independence of judgment required by [the] public trust" (424 U.S. at 423, 425).

The court of appeals suggested (Pet. App. A, pp. 18a–19a), however, that persons involved in administrative enforcement proceedings generally exercise less discretion than their counterparts in the judicial context, and that the outcome of administrative proceedings has less of an impact upon defendants. But

those proceedings frequently involve complex issues and require the exercise of considerable discretion. See Comment, *Federal Officers—Scope of Immunity from Damage Actions Available to Administrative Agency Officials,* 30 Rutgers L. Rev. 209, 234–237 (1976) (and references there cited).

Such proceedings also often involve important and hotly contested issues. Administrative proceedings brought by the Securities and Exchange Commission against publicly held companies, broker-dealers and accountants for violations of the securities laws, proceedings by the Food and Drug Administration against doctors and drug companies for selling unsafe or ineffective products, and actions by the Federal Trade Commission to remedy antitrust violations or false advertising, are only a few examples of administrative proceedings that are closely analogous, both in their intensely adversarial context and in the effect of the sanctions imposed, to criminal trials. These proceedings often result in far-reaching and precedent-setting decisions in such fields as antitrust, securities regulation, consumer protection and public health, which are of major importance to the regulation of the industries involved.[24]

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[24] The court of appeals also suggested (Pet. App. A, p. 20a, n. 8) that absolute immunity for those performing prosecutorial functions in the administrative context is unnecessary since administrative proceedings "of the type involved in the present case * * * usually turn more on documentary proof than the veracity of witnesses," and involve fewer "constraints of time and * * * information" than a criminal prosecution. The need for absolute immunity to allow administrative prosecutors to act vigorously

2. The Commodity Exchange Act, 42 Stat. 998, as amended, provides a comprehensive regulatory scheme for trading in "futures" of specified commodities on various exchanges. 7 U.S.C. (and Supp. V) 1 *et seq.* The Secretary of Agriculture has broad regulatory

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exists regardless of the type of evidence used or the time constraints involved. But in any event, the court's suggestion rests on dubious factual assumptions.

While the issue in any particular administrative proceeding may involve largely documentary proof, many, if not most, administrative enforcement proceedings involve extensive oral testimony. The administrative action involved in this case is an example. Although much of the case turned upon documentary proof, several key issues required the taking of oral testimony (the transcript of the initial hearing was more than 500 pages, see Decision and Order in CEA Docket No. 167, *supra*, p. 3) and judgments concerning respondent's credibility (see *id.* at 37). Indeed, the administrative decision ultimately was reversed by the court of appeals because it determined that the finding of willfulness—a finding that necessarily was based on inferences derived from oral testimony (see *id.* at 137–149)—was erroneous (see Br. in Opp. 2a–4a). See also *Air East, Inc.* v. *National Transportation Safety Board*, 512 F. 2d 1227 (C.A. 3), certiorari denied, 423 U.S. 863; *George Steinberg & Son, Inc.* v. *Butz*, 491 F. 2d 988 (C.A. 2); *Nadiak* v. *Civil Aeronautics Board*, 305 F. 2d 588 (C.A. 5), certiorari denied, 372 U.S. 913.

Administrative proceedings also often involve constraints of time comparable to those in criminal trials. See, *e.g.*, suspension proceedings under the Federal Insecticide, Fungicide and Rodenticide Act, 86 Stat. 985, 7 U.S.C. (Supp. V) 136d(c)(2), revocation of certification proceedings under the Federal Aviation Act, 72 Stat. 779, as amended, 49 U.S.C. (Supp. V) 1429(a), and proceedings for the issuance of emergency temporary standards under the Occupational Safety and Health Act, 84 Stat. 1596, 29 U.S.C. 655(c).

Moreover, federal criminal trials may at times turn upon documentary proof and involve no more severe time constaints than in certain administrative proceedings, yet these factors have not influenced courts to limit the availability of immunity for judges

authority under the Act.[25] His functions include the registration of "futures commission merchants" and the establishment of various requirements for their business, including the "meet[ing] [of] such minimum financial requirements as the Secretary * * * may by regulation prescribe" (7 U.S.C. 6f(2)). Pursuant to this authority the Secretary promulgated the regulations (17 C.F.R. 1.17 (1970)) prescribing minimum working capital requirements that were involved in the administrative proceedings in this case.

The Secretary is authorized to make "such investigations as he may deem necessary to ascertain the facts regarding the operations of * * * persons subject to any of the provisions of [the Act]" (7 U.S.C. 12; see 7 U.S.C. 15), and to "publish from time to time, in his discretion, the result of such investigation" (7 U.S.C. 12; see 5 U.S.C. 552). Finally, "[i]f the Secretary * * * has reason to believe that any person * * * is violating or has violated any of the provisions of [the Act]," he can file a complaint (7 U.S.C. 9); if the person is registered as a futures commission merchant, the complaint may seek sus-

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and prosecutors in the judicial context. The court of appeals' unsupported generalizations concerning the nature of administrative and judicial proceedings therefore is not an adequate ground for distinguishing the need of prosecutors and judges in the two contexts for immunity.

[25] In 1974 this regulatory authority was transferred to the newly established Commodity Futures Trading Commission. Section 101(a)(3) of the Commodity Futures Trading Commission Act of 1974, Pub. L. 93–463, 88 Stat. 1389, 7 U.S.C. (Supp. V) 4a. See also Sections 104 and 411.

pension or revocation of the registration (*ibid.*). Any person against whom such a complaint is filed is entitled to a hearing before the Secretary "or before a referee designated by the Secretary" (7 U.S.C. 9).[26]

The Secretary delegated most of this regulatory authority to other officials in the Department of Agriculture (see 29 Fed. Reg. 16211, 16214; 36 Fed. Reg. 3210; 37 Fed. Reg. 28463, 28475). The Secretary delegated general responsibility for the execution of policies and the enforcement of the Act to the Administrator of the Commodity Exchange Authority (29 Fed. Reg. 16214; 17 C.F.R. 1.4, 140.1(b) (1970)). The Secretary, however, retained the authority to issue administrative complaints, which under a general delegation order (29 Fed. Reg. 16211) he shared with the Assistant Secretary of Agriculture for Marketing and Consumer Services. The Secretary delegated to the Judicial Officerof the Department of Agriculture his authority to decide enforcement proceedings under the Act. 36 Fed. Reg. 3210; 37 Fed. Reg. 28463, 28475.

3. All of the petitioners' actions upon which the complaint in this case is based were taken under this regulatory scheme in the performance of their official duties. Moreover, the actions either involved the exercise of substantial discretion or were done at the behest of superior officers who themselves would have had absolute immunity.

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[26] Review of the final administrative order is available in the court of appeals, which has "jurisdiction to affirm, to set aside, or modify the order * * *." 7 U.S.C. 9.

a. *Butz.* Petitioner Butz, the former Secretary of Agriculture, had delegated most of his authority under the Act involved in this case to subordinate officials in the Department, and an Assistant Secretary issued the complaint that instituted the administrative proceeding. Petitioner Butz therefore was not "directly involved in any of the actions alleged in the complaint" (A. 145). In any event, as the cabinet officer with overall statutory responsibilities for enforcement of the Act, any actions he might have taken with respect to the initiation or decision of the administrative proceedings would have been discretionary acts within the scope of his authority. See *Spalding* v. *Vilas, supra; Gregoire* v. *Biddle, supra.*

b. *Lyng.* Petitioner Lyng, the Assistant Secretary for Marketing and Consumer Services (A. 145), signed the administrative complaints (A. 145). He took that action pursuant to the authority the Secretary had given him. The issuance of a complaint was done as part of his duties, and the decision to do so involved an exercise of considerable discretion. See *Imbler* v. *Pachtman, supra.*

c. *Caldwell.* Petitioner Caldwell was the Administrator of the Commodity Exchange Authority, to whom the Secretary had delegated general responsibility for administering and enforcing the Act (A. 145–146). In the exercise of that responsibility, Caldwell was responsible for initiating the investigation of respondent's financial condition and for releasing to the press an announcement of the issuance of the administrative complaints (A. 145-146). These were

discretionary functions for which Caldwell has absolute immunity. See *Imbler* v. *Pachtman, supra; Barr* v. *Matteo, supra.*

d. *Kirchhoff & Robinson.* Petitioner Kirchhoff was the Deputy Director of the Commodity Exchange Authority's Registration and Audit Division [27] and petitioner Robinson was the Director of the Authority's Compliance Division [28] (A. 146–147). As senior officials of the Authority, they both participated in the initiation of the administrative proceedings and collaborated in the preparation of the government's case (A. 146–147). Kirchhoff also reviewed the financial statements of respondent and the results of the audits conducted by the regional office (A. 147), and appeared as a witness at the proceedings (A. 147). These activities, which are essential to the effective enforcement of regulatory legislation, involve the exercise of discretion and judgment and were done as a part of Kirchhoff and Robinson's duties (A. 146–147).

e. *McMinn, Gross, Fitzpatrick & Wolkis.* Petitioner McMinn was the Director of the Regional Office of the Commodity Exchange Administration that directed,

[27] The responsibilities of the Registration and Audit Division included developing and administering a ~~problem~~ program for determining whether futures commission merchants met the statutory and regulatory financial requirements, and conducting audits to assure compliance with such requirements. 17 C.F.R. 140.1(c)(1) (1970).

[28] The responsibilities of the Compliance Division included recommending formal proceedings against violators and presenting the results of investigations to, and cooperating with, the General Counsel's Office and the Department of Justice in the preparation of administrative and criminal cases. 17 C.F.R. 140.1(c)(2) (1970).

coordinated and conducted all of the Authority's activities within the area it covered (17 C.F.R. 140.2 (1970); A. 147–148). Petitioners Gross, Fitzpatrick, and Wolkis were auditors of the Authority assigned to that office; Wolkis also performed supervisory functions (A. 148–149). At the direction of the Washington, D.C., office,[29] McMinn directed the other three to audit respondent's books (A. 147–148). All four of these individuals collaborated in preparing and presenting the government's case (A. 147–149). In addition, McMinn, Gross, and Fitzpatrick appeared as witnesses at the administrative proceedings (A. 148).

The conduct of an audit and the preparation of a case for hearing inevitably involve the exercise of considerable discretion. See *Ove Gustavsson Contracting Co.* v. *Floete, supra;* note 23, *supra.* Moreover, all of the actions of these four individuals were taken pursuant to instructions from the Director of the Authority's Registration and Audit Division and at the instigation of the Administrator (A. 144, 145). Because of the discretionary nature of their duties, the latter officials would have had absolute immunity had they performed those functions themselves, and for that reason, McMinn and the three auditors, too, have absolute immunity. See *Doe* v. *McMillan, supra.* Finally, to the extent that respondent's complaint is against McMinn, Gross and Fitzpatrick as witnesses,

[29] The direction came specifically from the Director of the Registration and Audit Division of the Commodity Exchange Authority (A. 144), who was not sued in this case.

they—like petitioner Kirchhoff, who also testified—are absolutely immune under the privilege that witnesses have for testimony given in a judicial or quasi-judicial proceeding. See *ALI, Restatement of Torts,* § 588, pp. 233–234 (1938); cf. *Yaselli* v. *Goff, supra,* 12 F. 2d at 403, 406.

f. *Davis.* Petitioner Davis was a lawyer in the General Counsel's Office of the Department, and presented the government's case at the administrative hearing (A. 147; 1 *Administrative Regulations* ¶210, p. 71 (1963); see 17 C.F.R. 0.11(c) (1970)). These actions were part of his official duties and involved a substantial element of discretion. His functions were similar to those of a prosecutor trying criminal cases. See *Imbler* v. *Pachtman, supra;* note 24, *supra;* cf. *Flood* v. *Harrington,* 532 F. 2d 1248 (C.A. 9).

g. *Bain & Campbell.* Petitioner Bain was the Department's Chief Hearing Examiner;[30] he conducted the hearing in this case and rendered the initial decision sustaining the complaint (A. 147; see 17 C.F.R. 0.2 (m) and (n), 0.7, 0.11 (1970)). Petitioner Campbell was the Judicial Officer of the Department to whom the Secretary had delegated his authority to decide enforcement proceedings under the Act and who rendered the final decision in the case (A. 141).

The only part Bain and Campbell had in the proceedings was to decide the case presented to them on the basis of the record and their interpretation of the law. If either of their decisions was erroneous, it was subject to correction: the Hearing Examiner by

[30] We are informed that petitioner Bain died on March 10, 1976.

the Judicial Officer and the latter by the court of appeals (as happened in this case).

Bain and Campbell are the counterparts in administrative proceedings of the judge in judicial proceedings, and the policy considerations that require absolute immunity for judges (see *Bradley* v. *Fisher, supra; Pierson* v. *Ray, supra*) also warrant like immunity for these quasi-judicial officials. They must evaluate the testimony of the witnesses, draw appropriate inferences from the evidence, and determine and apply the law. Their responsibilities involve a high degree of discretion.[31]

4. Respondent's amended complaint primarily rests its claim that the administrative proceedings were conducted unlawfully and maliciously upon three grounds, none of which rebuts our submission that petitioners have absolute immunity.

a. Respondent first contends that the issuance of the complaint was improper because the administrator had not given him notice of the violations and an opportunity to correct them, as the Administrative

[31] The court of appeals suggested (Pet. App. A, pp. 19a–20a) that the separation-of-powers principle distinguishes judges from administrative law judges and judicial officers. But prosecutors, who are members of the executive branch, have essentially the same immunity as judges when they initiate and conduct criminal proceedings. The scope of immunity is not determined by "judicial fiat that officials in different branches of government are differently amenable to suit" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 421); it is "the duties with which the particular officer[s] * * * [are] entrusted * * * which must provide the guide in delineating the scope of the * * * executive officer['s] * * * immunity from * * * suit[ ]" (*Barr* v. *Matteo, supra,* 360 U.S. at 573–574).

Procedure Act (5 U.S.C. 558(c)) and the regulations under the Commodity Exchange Act (17 C.F.R. 0.3 (c) (1970)) allegedly require (see pars. 5 and 13 of the second amended complaint, A. 157, 159). Both the statutes and the regulations, however, except from the notice and opportunity-to-correct requirements cases involving willfulness. Cf. *George Steinberg and Son, Inc.* v. *Butz,* 491 F. 2d 988 (C.A. 2).

The administrative complaint in this case alleged that respondent's violations of the minimum capital requirements were willful, and the Hearing Examiner and the Judicial Officer so found (see Decision and Order in CEA Docket No. 167, *supra,* pp. 137–149, 193). Accordingly, the initiation, prosecution, and decision of the enforcement action without prior notice were actions within the scope of petitioners' duties.

The fact that the court of appeals set aside the Judicial Officer's order because "the finding of willfulness appears erroneous" (Br. in Opp. 4a) does not mean that the persons responsible for bringing the proceedings acted beyond their authority. A federal official's actions are not outside the scope of his authority simply because it is subsequently determined that he was mistaken. See *Gregoire* v. *Biddle, supra.* "The fact that [an agency] misjudged the exact confines of its jurisdiction * * * and believed that it was proper under the particular circumstances [to proceed] * * * is a long way from acting palpably beyond the duties of an office." *Jones* v. *Kennedy, supra,* 121 F. 2d at 43; see *Bradley* v. *Fisher, supra,* 13 Wall. at 351; *Spalding* v. *Vilas, supra,* 161 U.S.

at 498. Here, the regulations authorize the initiation of enforcement proceedings without prior notice in circumstances found by petitioners to have existed in respondent's case. It was therefore within the scope of petitioners' discretionary authority to proceed with the enforcement action as they did.

b. Respondent next argues that it was improper to conduct proceedings after he had ceased operating as a futures commission merchant and had permitted his registration to expire by not renewing it (see pars. 5, 14, 15, 21 of the complaint, A. 157, 159, 160–161). The administrative complaints, however, sought not only to suspend or revoke respondent's registration, but also to prohibit him from all trading on the commodities markets. The latter remedy could be ordered whether or not respondent was a registered futures commission merchant. See 7 U.S.C. 9. Moreover, the judicial officer could have issued an appropriate remedial order designed to insure that, because of his violations, respondent would not again register as a futures commission merchant. See 7 U.S.C. 12a; Decision and Order in CEA Docket No. 167, *supra,* pp. 194–197 (and cases there cited).

c. Finally, respondent charges that petitioners issued a deceptive press release and made the administrative complaint available to the public without also making public respondent's answer (see pars. 7, 8, 16, 19, 20, 23, 24 of the complaint, A. 158, 159, 160, 161). Petitioners, however, issued no "press release" (App., *infra*). In accordance with the Department of Agriculture's standard practice (App., *infra*; see Decision and Order in CEA Docket No. 167, *supra,* pp.

162–165), copies of the complaint were supplied to reporters in the Department's Press Room. The original complaint had attached a cover sheet summarizing the complaint (A. 150 [32]); it is not known whether a cover sheet also was placed on the amended complaint (App., *infra*).

The release of the complaint to the press was done under statutory and regulatory authority to make available to the public records of the Commodity Exchange Authority. See 5 U.S.C. 552(a); 7 U.S.C. 12; 17 C.F.R. 140.3–140.6 (1970); 7 C.F.R. 1.1–1.4 (1970).[33]

The public disclosure of administrative complaints is a customary practice of federal regulatory agencies. Cf. *Federal Trade Commission* v. *Cinderella Career*

[32] The cover sheet to the original complaint stated that the "complaint charges that * * * respondent * * * failed to meet minimum financial requirements * * *," and that "[t]he issuance of a complaint * * * does not constitute proof of violation * * *" (A. 150).

[33] The Administrator's supervisory responsibilities include the promulgation of rules for the disclosure to the public of information in the possession of the Commodity Exchange Authority. 7 C.F.R. 1.4 (1970). The Secretary has determined generally that the "records of the Department are freely available for public inspection," with "certain exceptions" "limited to those expressly required by law or authorized by the standards and principles contained in [the Freedom of Information Act]." 7 C.F.R. 1.1 (1970). In accordance with this determination, the Administrator promulgated regulations providing broadly for the public disclosure of records of the Commodity Exchange Authority that were not exempt from mandatory disclosure under the FOIA. 17 C.F.R. 140.3–140.6 (1970); see 17 C.F.R. 1.5 (1970). Even records that are exempt from mandatory disclosure may be disclosed under certain circumstances. See 17 C.F.R. 140.6 (1970); 7 C.F.R. 1.4(a)(3) (1970).

& Finishing Schools, Inc., 404 F. 2d 1308, 1312–1314, 1317–1323 (C.A. D.C.); *Bowman* v. *United States Department of Agriculture*, 363 F. 2d 81, 86 (C.A. 5); Decision and Order in CEA Docket No. 167, *supra*, p. 162. In making this material available to the public, petitioners acted within the scope of their authority. See *Barr* v. *Matteo, supra*; *Howard* v. *Lyons, supra*. If respondent wanted the press to be aware of his answer to the complaint, it was his responsibility, not that of petitioners, to make it public.

5. The fact that some of the claims in this case allege that petitioners' actions violated respondent's constitutional rights (pars. 4, 13, 14, 15, 18, 19, 20, A. 157, 159, 160) does not require that petitioners' immunity be only a qualified one.[34] The considerations

[34] Although respondent charges that petitioners denied him due process of law, he does not identify the "property" interest involved. He has not been deprived of any property interest in his registration, since (1) he permitted it to expire and (2) the court of appeals vacated the administrative order suspending it.

To the extent respondent relies upon injury to his business reputation, that in itself is not a "property" interest protected by the Due Process Clause. See *Paul* v. *Davis*, 424 U.S. 693. In *Paul* v. *Davis*, the Court rejected the proposition that "every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' * * * establish[es] a violation of the Fourteenth Amendment" (424 U.S. at 699). The Court also held that, apart from the procedural due process rights that individuals have when the government attempts to alter or extinguish a right or status previously recognized by state law, an individual's "interest in reputation alone" is not a " 'liberty' " or " 'property' " interest guaranteed against state deprivation without due process (424 U.S. at 711–712).

The same analysis would apply here in the context of the Fifth Amendment. Assuming *arguendo* that it provides a basis for dam-

that support absolute immunity for federal officials are equally applicable and compelling whether the claim of improper performance of duties by government officials is framed in constitutional or traditional tort terms.[35]

Moreover, the conflicting considerations the Court weighed in *Barr*—on the one hand "the protection of the individual citizen against pecuniary damage," and on the other "the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits" (360 U.S. at 565)—should not be differently evaluated because the complaint is cast in constitutional terms. In either instance recovery is sought for alleged damages caused by tortious government conduct, and neither the plaintiff's interest in recovery nor the public interest in protecting government officials is altered because the claim is based on the Constitution rather than on the common law.

In the present case, respondent's principal claim is that his business and reputation were damaged by the allegedly unlawful administrative proceedings. Those interests are similar to, and certainly no greater than, the interest involved in *Barr,* where the complaint al-

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age claims against government officials, the Fifth Amendment nevertheless is not "a font of tort law" extending a right to sue "wherever the [government] may be characterized as the tort feasor" (424 U.S. at 701). Moreover, here respondent was afforded all the process to which he was due in connection with the administrative enforcement action.

[35] But see *Apton* v. *Wilson*, 506 F. 2d 83 (C.A.D.C.); *Mark* v. *Groff*, 521 F. 2d 1376 (C.A. 9); *States Marine Lines, Inc.* v. *Shultz*, 498 F. 2d 1146 (C.A. 4); cf. *Bivens* v. *Six Unknown Named Agents*, *supra*.

leged that a defamatory press release had injured the plaintiff's personal reputation. Indeed, part of respondent's claim here rests upon an allegedly defamatory "press release" and, to that extent, it is virtually identical to the claim in *Barr*.

Respondent's suit, in short, is for "defamation and kindred torts," *i.e.,* malicious prosecution, for which the Court in *Barr* held that federal officials have absolute immunity (see 360 U.S. at 569). The fundamental nature of that claim is not altered because respondent has added the allegation that the tortious conduct denied him due process. Such a charge can almost always be made in any tort case against a government official, and the form in which the pleading is drafted cannot obscure the true nature of the claim.

CONCLUSION

The judgment of the court of appeals, insofar as it reversed the dismissal of the complaint against petitioners (see p. 9 *supra*; Pet. App. C, pp. 29a–30a), should be reversed.

Respectfully submitted.

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JUNE 1977.

APPENDIX[1]

United States Department of Agriculture Before the Secretary of Agriculture

(CEA Docket No. 167)

IN RE ARTHUR N. ECONOMOU, AND ARTHUR N. ECONOMOU & CO., INC., RESPONDENTS

Response to Item 13, Judicial Officer's "Questions for the Oral Argument"

1. The Judicial Officer, in his "Questions for Oral Argument," served on the parties by letter dated

[1] The document contained in this appendix is the written response of petitioner Davis to a question that the Judicial Officer (petitioner Campbell) proposed to discuss at oral argument (see Decision and Order in CEA Docket No. 167, *supra*, pp. 6, 162). Respondent has objected to the inclusion of this document in the separate Appendix in this case because it is not part of the record sent to the Court by the court of appeals. We include it in this appendix to petitioners' brief, however, because it properly is a part of the record in this case.

The United States Attorney's records show that this document was handed to the district judge and served on respondent's counsel in open court on April 4, 1975. The document also is contained in the addendum to the petitioners' (defendants-appellees) brief in the court of appeals, at page 9a. (This and other documents were included in the addendum in lieu of an appendix in the court of appeals.) The record does not show that respondent objected to the inclusion of Davis' response in the addendum. The document thus was before the court of appeals when it decided this case.

February 18, 1972, requests in item 13, that copies of any "press releases issued by the complainant as to this proceeding" be forwarded to him and to the respondent.

2. Complainant does not consider that any "press release," as such, has been issued. What has been done is that copies of the complaint and the amended complaint were made available to the reporters using the Department of Agriculture Press Room. This is standard procedure whenever a complaint is issued. (See letter from Assistant Secretary Lyng to respondent filed herein on March 3, 1971 by respondent.) Normally, a cover sheet is attached which summarizes the allegations and explains the meaning and effect of the complaint.

3. Copies of the cover sheet for the original complaint are attached hereto. [See A. 150.] No copy of a cover sheet for the amended complaint is available. It is not now known whether such a cover sheet was attached to the amended complaint when it was placed in the Press Room.

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U.S. GOVERNMENT PRINTING OFFICE: 1977

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No. 76-709

In The

Supreme Court of the United States

October Term, 1976

EARL L. BUTZ, ET AL.,

Petitioners,

vs.

ARTHUR N. ECONOMOU, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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TABLE OF CONTENTS

Page

Statement of Facts 1

A. Procedural History 1

B. Substantive Facts 2

Question Presented 6

Summary of Argument 6

Argument:

I. Neither the sovereign nor its officials were ever absolutely immune from civil suit. 11

A. Review of the Origins of the Doctrine of Sovereign and Official Immunity Establish That Neither the Crown Nor Its Servants Were Ever Absolutely Immune from Suits for Their Wrongful Acts. 11

B. Review of the Early History of the Doctrine of Sovereign and Official Immunity in the United States Establishes That Neither the Federal Government Nor Officials of the Federal Government Were Ever Absolutely Immune from Suits for Their Wrongful Acts. 16

C. This Court's Recent Decisions Make It Clear That the Trend in the United States is to Limit Officials to At Best a Qualified Immunity Wherein They Must Be Acting Reasonably and In Good Faith. 19

Contents

Page

1. Violation of constitutional rights 19

2. Liability of the petitioners for traditional torts 24

3. Torts committed outside the scope of the authority of government officials 27

II. The holding by the Second Circuit Court of Appeals in this case is in accord with the present state of the law. 28

III. Petitioners' argument does not accord with the law or its trends. 32

A. Petitioners Misconstrue *Barr v. Matteo* and *Doe v. McMillan*. 32

B. Legislative Trends Support an Elimination of Aspects of Immunity. 36

C. *Scheur v. Rhodes* May Be Construed to Posit a Single Standard for Liability of Federal Officials Under the Constitution and Other Laws and State Officials Under Section 1983 Suits. 38

IV. The preferred policy is a uniform standard for liability of both federal and state officers. 40

A. The Rule of Law. 40

Contents

Page

B. There Is No Good Reason to Hold State Officials Under §1983 To a Different Standard Than Federal Officials Who Commit a "Bivins" Tort. 42

C. Immunities Granted Certain Officials. 45

D. The Desirability of Granting a Remedy to Those Aggrieved by Wrongful Official Action. 49

E. This Case Should Be Remanded to the Court Below. 52

Conclusion 54

TABLE OF CITATIONS

Cases Cited:

Apton v. Wilson, 506 F.2d 83 (1974) 39, 43, 44, 52, 53

Ashby v. White, 6 Mod. 45, 87 Eng. Rep. 808 (Q.B. 1702), rev'd., I Brown P.C. 45, 1 Eng. Rep. 417 (H.L. 1703) ... 13

Barr v. Matteo, 360 U.S. 564 .... 7, 8, 25, 26, 32, 33. 35, 36, 46, 49, 53

Bivins v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), 456 F.2d 1339 (2d Cir. 1972) 7, 8, 19, 20, 21, 25, 39

Black v. United States, 534 F.2d 528 (1976) 39

Page

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 35

Briggs v. Goodwin, 384 F. Supp. 1228 (D.D.C. 1974) 47

Cohens v. Virginia, 19 U.S. 264, 5 L. Ed. 257 (1821) 16

Conley v. Gibson, 355 U.S. 41 52

Doe v. McMillan, 412 U.S. 306 ..... 8, 32, 33, 34, 36, 45, 46

Economou, et al. v. United States Department of Agriculture, 494 F.2d 519 (1974) 6, 22

Economou, et al. v. United States Department of Agriculture, et al., 535 F.2d 688 .....8, 29

Entick v. Carrington, 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765) 14

Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian, Civ. No. 74-1899 (D.C. Cir. Oct. 20, 1976) 41

Halpern v. Kissinger, 424 F. Supp. 838 (1976) 40

Hamptin v. City of Chicago, 484 F.2d 602, cert. denied, 415 U.S. 917 47

Henderson v. Bluemink, 511 F.2d 399 (D.C. Cir. 1974) 41

Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975) 47

Howard v. Lyons, 360 U.S. 593 32

Page

Imbler v. Pachtman, 424 U.S. 409 .....9, 30, 45, 46, 47

Kawananakoa v. Polyblank, 205 U.S. 349, 27 Sup. Ct. 526, 51 L.Ed. 834 (1907) 12, 16

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949) 17

Mark v. Groff, 521 F.2d 1376 (1975) 39, 43, 52

Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891) 51

Monroe v. Pape, 365 U.S. 167 (1961) 19

Osborn v. The Bank, 22 U.S. (9 Wheat.) 738 (1824) 17

Pierson v. Ray, 386 U.S. 547 (1967) 20, 21, 28, 45, 46

Pond v. General Electric Co., 256 F.2d 824 52

Rowley v. McMillan, 502 F.2d 1326 (1974) 39, 44

Scheuer v. Rhodes, 416 U.S. 230 ..... 8, 9, 10, 28, 29, 31, 38, 39, 43, 45, 49, 52, 53

Spalding v. Vilas, 161 U.S. 483 .....20, 25

States Marine Lines, Inc. v. Schultz, 498 F.2d 1146 (1974) 39, 44

Thomas v. The Queen, L.R. 10 Q.B. 31 (1874) 15

United States v. Lee, 106 U.S. 196 (1882) 7, 17

Page

United States v. O'Keefe, 78 U.S. (11 Wall) 178 (1870) 12

Williams v. Gorton, 529 F.2d 668 52

Wisconsin v. Constantineau, 400 U.S. 433 .....9, 35

Wood v. Strickland, 420 U.S. 308 (1975) 24, 29, 30

Yaselli v. Goff, 12 F.2d 396 (1926), aff'd. per curiam, 275 U.S. 503 (1927) 45

Zweibon v. Mitchell, 516 F.2d 594 (C. of A., D.C. 1975) 21

Statutes Cited:

Civil Rights Act of 1871, 42 U.S.C. §1983 .....8, 19, 20, 25, 28, 30, 42, 45, 53, 54

Federal Torts Claims Act of 1946, 28 U.S.C. §1291 et. seq. 37

Title II of the Housing and Rent Act 26

Tucker Act of 1875, 28 U.S.C. §1346 37

5 U.S.C. §702 .....9, 37

18 U.S.C. §242 45

28 U.S.C. §1331, amended by Pub. L. 94-574, 90 Stat. 2721 ..... 9, 24, 38

Page

28 U.S.C. §2680(h), amended by Pub. L. 93-253, 88 Stat. 50 38

United States Constitution Cited:

Article 1, Section 6 33

First Amendment 5, 22, 44

Fourth Amendment 19, 41, 44

Eleventh Amendment 17

Other Authorities Cited:

K. Davis, Administrative Law of the Seventies (supplementing Administrative Law Treatise) 583 (June 1976) 25

Dicey, Law of the Constitution, 189 (8th Ed. 1915) 14, 40

L. Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209 (1963) 18, 50, 51

L. Jaffe, Suits Against Government and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963) 11, 12, 13, 14, 15, 16, 17, 42

W. Prosser, Law of Torts 970 (Hornbook Series, 4th Ed., 1971) 11, 16

Comment, Accountability for Government Misconduct: Limiting the Qualified Immunity and the Good Faith Defense, 49 Temple Law Quarterly 938 (1976) ... 19, 21, 24

Contents

Page

Comment, Federal Officers — Scope of Immunity From Damage Actions Available to Administrative Agency Officials, 30 Rutgers Law Review 209 48

Comment, Governmental Immunity — Degree of Immunity Applicable to Government Executive Officials in Defamation Suits, 50 Temple Law Quarterly 191 (1976) 41

Comment, Quasi-Judicial Immunity: Its Scope and Limitations in Section Nineteen Eighty-three Actions, Vol. 1976 Duke Law Journal 95 ..... 46, 47, 48

14 U.S.C., Congressional and Administrative News, Dec. 3, 1976, p. 6560 37

Committee on Judiciary, House Report No. 94-1656 37

In The

Supreme Court of the United States

October Term, 1976

No. 76-709

EARL L. BUTZ, ET AL.,

Petitioners,

vs.

ARTHUR N. ECONOMOU, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF FACTS

A. Procedural History

Suit in this case was commenced by the respondents in 1972 against the named petitioners. Subsequent to certain preliminary proceedings, the complaint was amended in 1975 (A156)* and on March 20, 1975, the plaintiffs-respondents served and filed

* The index to the appendix states that the verified second amended complaint is dated March 31, 1975. In fact, the index is incorrect, in that the complaint was verified on March 6, 1975.

interrogatories (A151) on the defendants-petitioners. Subsequent to the filing of the interrogatories, the petitioners moved to dismiss the second amended complaint (A163). The entire notice of motion to dismiss the amended complaint is laid out in full on page 163 of the Appendix. Said notice of motion includes no attachments, no affidavits, and no other documents except a brief which was submitted in support of said motion. All discovery proceedings have been stayed by the district court pending a decision by this Court on this petition. No discovery had been commenced prior to the filing of the second amended complaint.

The only relevant grounds upon which the petitioners allege in their motion, that they are entitled to have this action dismissed, is ". . . as to the individual defendants it is barred by the doctrine of official immunity . . . ." The United States Court of Appeals reversed the decision of the district court and held that none of the defendants were entitled to absolute immunity. 535 F.2d 688 (Petition, Appendix A, pp. 1a-22a).

B. Substantive Facts

The allegations in this case are laid out in the verified amended complaint (A156). In that this case was dismissed, pursuant to a motion to dismiss, all facts as alleged in the complaint must be deemed to be true.

The allegations in the complaint allege, among other things, that the defendants, including law enforcement officers, acting in their ministerial capacity, did conspire to interfere with, violate, and did interfere with and violate the plaintiffs' rights and privileges and did deprive the plaintiffs of property without due process of law.

It is further alleged that proceedings were instituted against the plaintiffs-respondents by the individual petitioners and the Commodity Exchange Authority, which proceedings were

unauthorized and outside the discretionary functions and responsibilities of the petitioners. In that the respondents had been publicly critical of the staff and operations of the petitioners the sole purpose in bringing wrongful proceedings against the respondents was ". . . to suppress legitimate business activities of the plaintiffs . . . and accomplish the ruin of their business reputation, through harassing them, . . . and in general attempting to interfere with their freedom of speech, and expression." As alleged in paragraph 18 of the complaint (A160), the unauthorized and illegal activities of the petitioners were deliberately designed to deplete the financial and human resources of the plaintiffs-respondents and chill their speech.

It is further alleged that the petitioners did knowingly release deceptive press releases to the media, falsely indicating that the plaintiffs-respondents' financial resources had deteriorated in a deliberate attempt to injure the plaintiffs-respondents and their business.

Paragraph 21 of the complaint points out that the petitioners did ". . . act outside the scope of their authority and abuse legal process . . ." by their continued prosecution of the respondents when respondents were no longer even subject to their jurisdiction.

Paragraph 22 of the complaint (A161) asserts that such defendants-petitioners who were law enforcement and investigative officers acted outside the scope of their authority and maliciously prosecuted the plaintiffs. There are also allegations of trespass (paragraph 25 of the complaint, A161).

Following the issuance of an amended complaint in this case, as alleged in the complaint (A158), the petitioners issued a deceptive press release falsely indicating to the public that the respondents' financial resources had deteriorated, when petitioners knew that said statement was untrue, and so acknowledged previously in certain hearings that the assertion was untrue.

In January of 1973 defendant Campbell issued a final decision and order adopting verbatim the sanctions recommended by defendant Bain in the original complaint against the respondents, though respondents had not for some years either been registered as futures commission merchants or otherwise subject to the petitioners' regulatory authority. Indeed, the petitioners suspended the registration of the respondents despite the fact that respondents were no longer registered with petitioners.

As alleged in the complaint (paragraph 12, A158-159), respondents were required to spend an aggregate amount of approximately $30,000 in defending themselves against the wrongful proceedings of the petitioners. That these proceedings were wrongful has been clearly established by the decision in the Second Circuit indicating that the proceedings should not have been commenced without the normal warning letter, which the petitioners themselves admit, if it had been issued, would have resulted in compliance with any alleged deficiencies.

The commencement of the unauthorized proceedings by the petitioners against the respondents, without notice or warning as required by law, was in violation of due process, and coupled with the knowingly wrongful press release and the insistence upon proceeding against the respondents even after they left the petitioners' jurisdiction, was with malice and with a deliberate intent to destroy the business and reputation of the respondents, and the petitioners did in fact severely injure the business and reputation of the respondents by this violation of the rights and privileges of the respondents, the violation of due process of law, and the taking of respondents' property without due process of law.

The petitioners sought thereby to suppress the legitimate business activities of the respondents, directly or indirectly, which business activity Congress had not granted them authority to regulate, and to punish the respondents and accomplish the

ruin of their business reputation through harassment and false publicity (A159).

This unauthorized and illegal activity by the petitioners did not only deplete the financial and human resources of the respondents, but discouraged and chilled the campaign of criticism the respondents had commenced against the petitioners, thereby depriving the respondents of their rights to free expression guaranteed by the First Amendment of the United States Constitution.

The petitioners also failed to furnish, in the public files made available to third parties, the respondents' answer to the complaint and sought thereby to subject respondents' unregulated business affairs to harm, discredit and damage (A160). The issuance of the deceptive press release indicating that respondents' financial situation had deteriorated since the issuance of the original complaint, which factual assertion was known by the petitioners to be false, had a serious effect upon respondents' public standing and the willingness of customers and business associates to do business with the respondents.

Those petitioners who were law enforcement and investigative officers did abuse legal process and maliciously prosecute the respondents, demanding sanctions against them when they were no longer subject to governmental jurisdiction and acting outside of the scope of their authority, said petitioners did also pursue prosecution known to them to be wrongful (A160-161). Petitioners did also, by publishing false information about the respondents and wrongfully making public distorted information about the respondents, invade the privacy of the respondents and cause them substantial injury. The petitioners, with intent to harm the respondents, did negligently publish false information about the respondents causing the respondents harm (A161).

By reason of all the acts of the petitioners, the respondents'

business incurred heavy financial and emotional burdens, were damaged immeasurably, and respondents were denied their constitutional rights.

Some of the facts in this case are more elaborately laid out in the affidavit of Arthur N. Economou (A15), which was originally made in support of an application to stay the illegal proceedings the defendants-petitioners had commenced against the respondents. The Court of Appeals for the Second Circuit, in the case of *Economou v. Department of Agriculture, et al.*, 494 F.2d 519, held on March 28, 1974, that indeed for one reason at least, the actions of the defendants-petitioners against the respondents was wrongful (found in Appendix B to the Brief in Opposition to the Petition).

QUESTION PRESENTED

Whether federal government officials who have acted wrongfully, breaching constitutionally protected rights and committing other tortious acts, have an absolute immunity from suit for these wrongful acts which were both within and beyond the ambit of their official responsibility.

SUMMARY OF ARGUMENT

I.

A. The alleged immunity from suit by the government and its officers has its origin in the concept that "the King can do no wrong". This concept did not mean that either the King or his ministers were absolutely immune from suit. The "petition of right" and other remedies existed so that suits could be brought against the Crown, and if endorsed, as they generally were, with the words, "let justice be done", then the matter would proceed. In addition to the petition of right, there were numerous other means of proceeding against the Crown and its officers.

B. It is unclear as to how this doctrine that "the King can do no wrong", which included an additional doctrine, namely, that he was not liable for the wrongs of his servants in that they could not do for him what he could not do for himself, was transplanted to the democratic United States. In addition to this vestige of monarchy having been transferred to the United States, it lost certain of its efficacy, because once the King was abolished, some courts concluded that where in the past, procedure had been authorized by petition of right, there was now no one authorized to consent to suit.

Nevertheless, early in American history there were suits permitted against federal offices, *e.g., United States v. Lee,* 106 U.S. 196 (1882).

At an early stage in the development of the immunity doctrine in the United States, a distinction was made between the acts of high-ranking officials requiring discretion, who might be held immune to suit within that area of discretion, and those officials acting in a ministerial capacity, who were clearly liable for their torts.

C. 1. In the case of *Bivins v. Six Unknown Named Agents,* 403 U.S. 388, which was remanded to the Second Circuit (456 F.2d 1339), this Court held that federal officials were liable in damages for violation of the constitutional rights of others, except that they were given the defense of good faith and probable cause.

2. While it is clear that federal officials can be held liable for "Bivins" type torts, in the area of traditional intentional torts, *Barr v. Matteo* has been held by some to bar high-ranking officials, acting in discretionary areas, from liability. Some courts and the petitioners in this case have wrongly construed *Barr v. Matteo* to hold that all federal officials acting within the outer scope of their authority are immune to all suits for their tortious conduct. In fact, the *Barr* holding is a much more

limited holding and does not preclude holding federal officials liable for their intentional torts. The *Barr* holding requires an examination of the position of the federal official, the scope of his discretion, and the factual circumstances of the case. When analyzed in such a context, all petitioners here would be amenable to suit, with the possible exception of the Secretary of Agriculture.

3. With regard to the torts the petitioners committed outside the scope of their authority, they are clearly liable to suit and are not protected by any doctrine of immunity.

II.

The decision of the Second Circuit Court of Appeals in this case, *Economou v. U.S. Dept. of Agriculture,* 535 F.2d 688, is consistent with the holding of this Court in *Scheuer v. Rhodes,* 416 U.S. 230, and applies the limited immunity granted to state officials pursuant to a Section 1983 suit in *Scheuer v. Rhodes* to federal officials with regard to *Bivins* and other type torts. The opinion of the Second Circuit is consistent with the holdings of numerous other courts of appeal in applying *Scheuer v. Rhodes'* limited privilege of immunity to federal officials.

III.

A. On the other hand, the petitioners' assertion that *Barr v. Matteo,* 360 U.S. 564, grants total immunity to all federal officials acting within the outer perimeters of their authority, accords neither with the actual decision in *Barr v. Matteo* nor with trends in the law. *Doe v. McMillan,* 412 U.S. 306, is not merely a gloss on *Barr,* but makes quite clear that even Congressmen, whose immunity is spelled out in the Constitution, when acting outside of the direct legislative sphere, may be held liable for wrongful dissemination of certain documents.

The Second Circuit opinion also noted that when dealing with a person's good name, reputation, honor and integrity, this Court has advised particular caution. *Wisconsin v. Constantineau,* 400 U.S. 433.

B. Not only the trends of the cases but also legislative trends which have eliminated the need for specific amounts in controversy for bringing suit against an officer or employee or agency of the United States, Pub. L. 94-574, 90 Stat. 2721, and the modification of 5 U.S.C. §702 by Pub. L. 94-574 permitting the accountability of federal agencies to injunctive, declaratory judgment and writ of mandamus relief, all bespeak of the trend which, as the Committee on the Judiciary noted, ". . . is strong with regard to the elimination of sovereign immunity."

C. Clearly the uniform standard of limited good faith, reasonable immunity for certain federal officials, enunciated by this Court in *Scheuer v. Rhodes* with regard to state officials, seems to be preferred by the overwhelming majority of courts and writers.

IV.

A. The concept of the rule of law, wherein all persons are subject to its mandate and liabilities, is fundamental to our system of government.

B. While judges, legislators and prosecutors enjoy certain special immunities, which are often, at least with regard to judges and prosecutors referred to as quasi-judicial immunity, this immunity itself, as explicated in *Imbler v. Pachtman,* 424 U.S. 409, is limited to certain very specific acts of a prosecutor. Thus as this Court stated in *Imbler v. Pachtman:*

> "We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under section 1983." 424 U.S. 409, 431.

C. While within that ambit the prosecutor has been held immune from suit, this Court has recognized the fact that the wrongful acts of prosecutors within his area of immunity can still be substantially harmful to persons affected by such acts.

The chief constant thread which runs through all the grants of immunity, both to judges, legislators, prosecutors and high-ranking officials, is the need in each case for particularly broad discretion in order to effectively carry out official duties.

D. In addition to having a uniform standard for the liability of both federal and state officials, which apparently has come about as a result of the interpretation of *Scheuer v. Rhodes* by federal courts of appeal, it is also desirable to grant a remedy to those wrongfully aggrieved by official action. Several writers have suggested that one way to effectuate such a result would be to apply the doctrine of *respondeat superior* to officials who are employed by federal agencies. Under such circumstances persons could recover from the agencies, thereby insuring themselves a solvent defendant if they have been seriously wronged, and at the same time eliminating the need to sue the individual government official, who, in the ordinary course of events would be reimbursed by some form of private bill for his wrongful acts.

E. In view of the fact that this case has not proceeded to discovery, and the facts of the case have yet to be developed, as noted in *Scheuer v. Rhodes,* 416 U.S. 232, 243, the matter should be remanded to the courts below, for proceedings consistent with the opinion of the Second Circuit of Appeals, save that the agencies which have been sued should now be restored to the status of defendants in the original case.

ARGUMENT

I.

NEITHER THE SOVEREIGN NOR ITS OFFICIALS WERE EVER ABSOLUTELY IMMUNE FROM CIVIL SUIT.

A. Review of the Origins of the Doctrine of Sovereign and Official Immunity Establish That Neither the Crown Nor its Servants Were Ever Absolutely Immune from Suits for Their Wrongful Acts.

The alleged immunity from suit by the government and its officers has its origin in the concept that "the King can do no wrong." Scholars have asserted that the original meaning of that expression in England was that the King was not *allowed* — indeed, not *entitled* — to do wrong.[1] There is, as has been noted, a clear distinction between the immunity of the sovereign from suit and the capacity of the sovereign to violate the law.[2] There was the feeling that ". . . it was necessarily a contradiction of his sovereignty to allow [the King] . . . to be sued as of right in his own courts."[3] This idea did not become fully established until the days of quite absolute monarchs in the sixteenth century, and then ". . . it was always coupled with the qualification that for every act of the King some minister was always responsible."[4]

The consent, which was required of the King in England so that he may be sued in his own name, was not based on a view

1. L. Jaffe, *Suits Against Government and Officers: Sovereign Immunity,* 77 *Harv. L. Rev.* 1, 4 (1963).

2. *Id.*

3. W. Prosser, *Law of Torts* 970 (Hornbook Series, 4th Ed., 1971).

4. *Id.* at 971.

that the King was above the law.[5] Although the King could not issue a writ against himself, nevertheless, when a petition was presented to him, he endorsed on the petition words that permitted the courts to proceed, namely, "let justice be done."[6] Thus there was a distinction between sovereign immunity and the capacity of the King to violate the law, for as Jaffe has pointed out, if the King endorses a petition permitting the courts to proceed against him, then obviously, the King has acted contrary to law.[7]

In England there were many suits against the Crown which could be pursued by suits against the ministers of the Crown. And when necessary to sue the Crown by name, ". . . consent apparently was given as of course."[8]

At the time of Henry III ". . . the King's Exchequer, acting

5. Jaffe, *supra* note 1, at 3.

6. Jaffe, *supra* note 1, at 4.

7. But *cf. Kawananakoa v. Polyblank,* 205 U.S. 349, 353 (1907). The concept of petitioning the King arose from the time of Edgar I, who wished to give everyone an opportunity to approach him. From this grew the practice of handling petitions which are screened by special commissions, the Privy Council or the Chancellor. If petitions were endorsed, "let justice be done", they were tried by a commissioner of a department and finally sent to either the Exchequer, Chancery, or King's Bench for ultimate disposition under the law. While a petition could be refused, ordinarily a petition of right would not be refused without some legal justification by the King or the institutions that handled the petition. In addition to a petition of right, there were other means of securing special kinds of relief, such as the traverse or *monstrans de droit,* which was used for real property claims in which the Crown had an interest. The Equity Division also entertained some suits against the Crown because, as Jaffe has noted, certain procedural prerogatives were granted the King in the Chancery Courts. The Court of Exchequer, as a court of revenue, gave relief in certain special matters. A petition of right also lay for breach of contract by the Crown. Jaffe, *supra* note 1, 6, 8. *See also United States v. O'Keefe,* 78 U.S. (11 Wall) 178 (1870).

8. Jaffe, *supra* note 1, at 1.

as sort of an administrative court, could at the suit of private individuals discipline the sheriffs and bailiffs . . . and order them to desist and answer to the individual for their trespasses. Otherwise, . . . the modern idea that an official who commits a wrong is responsible personally was not yet of absolute effect; the King can claim the act as his own and thus insulate the officer from responsibility."[9] Judgment could be granted, of course, if the King disclaimed the act. "Thus one who had been disseised in the King's name could recover his land by bringing an action against the officer."[10] Later statutes in 1285 permitted those imprisoned for a felony without indictment to sue for false imprisonment. During this time, however, the King's permission to sue officers outside the Exchequer was still needed, though the King's privilege was gradually waived as to lower officers.

Jaffe points out that the impact of government upon the individual in the nineteenth century was primarily at the local level, and local officials were subject to the direct control of the Privy Council. They could be sued at common law, as well as proceeded against by criminal presentment. There was no need for consent to sue them. Nevertheless, the Crown apparently did not renounce its power to interfere with the progress of proceedings and remove them to the Privy Council.[11] There were numerous suits commenced against a variety of officers in the 1600's so that by a statute of James I in 1609, a losing plaintiff was required to pay double costs.[12]

In the famous case of *Ashby v. White,* 6 Mod. 45, 87 Eng. Rep. 808 (Q.B. 1702), *rev'd.,* I Brown P.C. 45, 1 Eng. Rep. 417 (H.L. 1703), it was established that a party could sue — in this

9. Jaffe, *supra* note 1, at 9.

10. Jaffe, *supra* note 1, at 9.

11. Jaffe, *supra* note 1, at 9, 10.

12. Jaffe, *supra* note 1, at 10.

case a Parliamentary official — for corrupt rejection of a vote in a Parliamentary election, and not merely for trespass, for taking of goods, interference with land, or a laying hands on the person. Thus here is an interference with a political right involving no trespass in which suit was permitted.

Jaffe points out that:

> "It must be admitted, in fact, that there have been in the past relatively few instances of actions against officers of state, against the 'King's servants,' those high secretaries who function directly for him in the conduct of government. This may be a consequence not of a doctrine of nonsuability as such but of discretion . . . or privilege — not privilege against suit, but privilege to act. Or it may be because normally the actions of high officers do not involve the direct interferences associated with trespass."[13]

Thus Jaffe concludes that Dicey's famous dictum that all, including officials, have the same responsibility for their acts under the law may not be completely accurate.[14] That is to say, while there were indeed many suits against inferior officers in England at the time, [15] there were very few damage suits as such against high officers. There nevertheless were famous cases against high officers of the Crown, including one of the Lords of the King's Privy Council.[16]

13. Jaffe, *supra* note 1, at 15.

14. Jaffe, *supra* note 1, at 15; Dicey, *Law of the Constitution,* 189 (8th Ed. 1915).

15. There were also many suits where the prerogative writs were issued against high officers.

16. Jaffe, *supra* note 1, at 15, citing the case of *Entick v. Carrington,* 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765).

In 1865 there was a decision which held that the petition of right did not permit recovery against the King for the torts of a servant of the King, not because of the Crown's immunity to suit, but rather because, since the King could do no wrong, no one could commit a tort in his name, and thus the doctrine of *respondeat superior* was held inapplicable. *Thomas v. The Queen,* L.R. 10 Q.B. 31 (1874).[17]

The writs of certiorari, mandamus, quo warranto, and habeas corpus ran against many official boards and commissions, though not against the King's high secretaries of state, and in the case of illegal official action, one could sue the King's officers for damages.[18]

Mandamus, certiorari, and writs of error were all used in the early and mid-seventeenth century. Nevertheless, there were times when the courts held they were powerless to act because of the prerogatives of the central government.[19]

It is quite clear from this brief summary of English law that neither the sovereign nor the office of the state enjoyed absolute immunity from suit. Aside from writs which could be used to correct official wrongdoing, clearly lower officials were subject to suit in many instances, and even high officers of the Crown had to answer in damages for certain wrongs. Thus under

17. Holdsworth and Jaffe both criticize this decision in that it rests on reasoning which does not take into consideration our contemporary notion of *respondeat superior,* namely, the duty of the principal to make good on damage done by his agent in carrying out the principal's affairs. There were later cases that held that the petition of right covers the statutory duties to pay compensation for use of property. Jaffe, *supra* note 1, at 8.

18. Jaffe, *supra* note 1, at 8.

19. Jaffe, *supra* note 1, at 16, 17, 18.

English law: "There was a wide range of actions for damages against officials."[20]

B. Review of the Early History of the Doctrine of Sovereign and Official Immunity in the United States Establishes That Neither the Federal Government Nor Officials of the Federal Government Were Ever Absolutely Immune from Suits for Their Wrongful Acts.

Despite the expulsion of the monarchy, certain facets of the doctrine of sovereign and official immunity became part of the law of the United States of America.

> "Just how this feudal and monarchistic doctrine ever got itself translated into the law of the new and belligerently democratic republic in America is today a bit hard to understand.[21]
>
> By a magnificent irony, this body of doctrine and practice, at least in form so favorable to the subject, lost one-half of its efficacy when translated into our state and federal systems. Because the King had been abolished, the courts concluded that where in the past the procedure had been by petition of right, there was now no one authorized to consent to suit."[22]

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20. Jaffe, *supra* note 1, at 19. Nevertheless, Jaffe notes that a serious deficiency of the law was the nonliability of government for the torts of its servants. This did not of course mean that the servant was not liable for his torts.

21. Prosser, *supra* note 3, 971. But *cf. Cohens v. Virginia,* 19 U.S. 264, 411, 412, 5 L. Ed. 257 (1821); *Kawananakoa v. Polyblank,* 205 U.S. 349, 353; 27 Sup. Ct. 526, 51 L. Ed. 834 (1907).

22. Jaffe, *supra* note 1, at 2. Jaffe notes that the states were resistant to being sued on their debts, which may in part account for the survival of the

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At an early period in American legal history, suits were permitted against officers of state governments.[23] In the famous case of *United States v. Lee,* 106 U.S. 196 (1882), which was a suit against a federal officer, the owners of the estate of General Robert E. Lee were able to eject two officers of the United States who had wrongfully taken possession of the land for failure to pay taxes, despite the proffer of taxes on behalf of the owners. In that it was alleged that a petition of right would have been required in such a case under English law, assertions were made that no suit would lie. This Court held, however, that in view of the essential difference between the character of the two governments ". . . little weight can be given to the decisions of the English courts. . . ."[24]

A long series of cases differed in their results as to the liability of federal officers for suit for breach of contract and equitable claims against property in the hands of the government.[25] In the famous case of *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949), it was held that a suit may be brought against an officer of the federal government if he has acted unconstitutionally or *ultra vires* his authority. Nevertheless, there is some wording in the *Larson* case which limits this broad assertion.[26]

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doctrine of sovereign immunity. The Eleventh Amendment to the Constitution of the United States was passed in part to insulate the states from suits, particularly those for breach of contract.

23. *Osborn v. The Bank,* 22 U.S. (9 Wheat.) 738 (1824), Jaffe, *supra* note 1, at 21. *See also* dissenting opinion in *United States v. Lee,* 106 U.S. 196 (1882).

24. 106 U.S. at 208. *See* Jaffe, *supra* note 1, at 23, 24.

25. *See* Jaffe, *supra* note 1, at 29-35.

26. *See* Jaffe, *supra* note 1, at 34 and 337 U.S. at 691, 693.

An examination of damage actions against officers of the government reveals that there has generally been a dichotomy in asserting liability between cases in which the officer has discretion, or power to make a choice between different alternatives, in which case he would not be held liable in damages even if he made the wrong choice. In cases in which an officer acts in a ministerial capacity wherein he fails to perform his ministerial functions, he has been held liable for his torts.

Certain writers have argued that the ministerial-discretionary distinctions are really conclusory distinctions based upon the court's analysis of the following:

> ". . . the character and severity of the plaintiff's injury, the existence of alternative remedies, the capacity of a court or jury to evaluate the propriety of the officer's action, and the effect of liability whether of the officer or of the treasury on effective administration of law."[27]

Historically, judges, prosecutors, legislators, and certain other officers were given immunity from suit for acts within certain specific authority, which shall be discussed below.

> "In the older tradition the immunity of these lesser officers was usually qualified by a requirement of reasonableness or at least 'good faith'. . . ."[28]

There is no question that the courts have held that certain officials enjoy absolute immunity under certain circumstances, particularly where they are operating in areas of discretion or

27. L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 *Harv. L. Rev.* 209, 219 (1963).

28. Jaffe, *supra* note 27, at 221. Jaffe recognizes that some jurisdictions in 1963 had abandoned this qualification.

policy-making. Nevertheless, it is also clear that absolute immunity from suit is not, and has never been, available to all officers of the federal government.

C. This Court's Recent Decisions Make It Clear That the Trend in the United States is to Limit Officials to At Best a Qualified Immunity Wherein They Must Be Acting Reasonably and In Good Faith.

1. Violation of constitutional rights.

It is without peradventure that damage actions lie against government officials who violate the civil rights of citizens.[29] Indeed, it has been said that ". . . perhaps the most important remedy available to individuals whose civil rights have been violated by government officials is the civil action for damages."[30] This Court in *Bivins* held a cause of action for damages against federal officials exists for violation of constitutionally protected rights under the Fourth Amendment[31] and under the Civil Rights Act of 1871[32] for violations of an individual's civil rights by state officials.[33]

Recent cases have altered the rationale upon which official immunity was based, namely, that "the King can do no wrong," and is not responsible for torts of his servants who cannot do for him what he cannot do for himself. The current rationale is

29. *Bivins v. Six Unknown Named Agents*, 456 F.2d 1339 (2d Cir. 1972); 403 U.S. 388 (1971).

30. 403 U.S. 388, 400; *Comment, Accountability for Government Misconduct: Limiting the Qualified Immunity and the Good Faith Defense*, 49 *Temple Law Quarterly* 938, 939 (1976).

31. *Bivins v. Six Unknown Named Agents*, 403 U.S. 388.

32. 42 U.S.C. §1983 (1970).

33. *Monroe v. Pape*, 365 U.S. 167 (1961).

based upon the assumption that officials should not be inhibited from operating by fear of suits for damage. While this Court has held certain officials immune from suit under §1983 cases, such as judges (*Pierson v. Ray,* 386 U.S. 547 (1967)),[34] officers have been generally held liable for their official acts.

In *Bivins v. Six Unknown Named Agents,*[35] the Second Circuit held that it would be incongruous to hold police officers immune from suit under federal law in view of the fact that they clearly do not enjoy immunity under the Civil Rights Act, 42 U.S.C. §1983. In that case it was held that Federal Bureau of Narcotics agents, acting under claim of federal authority, acted within the scope of their authority.[36] Since the officers in this case were not heads of department nor the actions complained of manifestly beyond their authority, the acts were held neither to be discretionary in the sense of broad policy-making acts nor beyond the scope of defendants' authority.

Nevertheless, these officers were allowed the ". . . defense of good faith and probable cause, and this has been consistently read as meaning good faith and 'reasonable belief' in the validity of the arrest or search."[37] Thus in the *Bivins* case the complaint

34. *See* dissent of Douglas in *Pierson v. Ray,* where he argues that Congress contemplated, quoting extensively from the debate in the Senate during the enactment of §1983, that even judges would be liable for suit under 1983 if they violated someone's civil rights.

35. 456 F.2d 1339.

36. The Court cited *Spalding v. Vilas,* 161 U.S. 483, 498, for the proposition that if the actions had ". . . more or less connection with the general matters committed by law to his control or supervision," then the official is within the scope of his authority. As the *Bivins* court pointed out, 456 F.2d 1339, 1343, 1344, federal game wardens conducting a search without a warrant and unsupported by an arrest were held operating beyond the scope of their official duties (9th Cir. 1962), as was a postal inspector who entered a house without a warrant, restraining plaintiff's wife, and taking certain property (1st Cir. 1965).

37. 456 F.2d 1339, 1347.

was held sufficient to allege a cause of action, for the court held that:

> "Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable." 456 F.2d at 1348.

It has been strongly argued that the *Bivins* good faith defense has resulted ". . . in a tipping of the already precarious balance 'between the objectives of efficient law enforcement and the maximization of due process liberties.'"[38] The assertion of the privilege, wherein an individual ordinarily would be held liable but for its existence, while different than an immunity, which is the absence of all civil liability, has nevertheless been considered by more than one writer to have gone too far.[39]

The limited defense to suits arising from violation of constitutionally protected rights, as in the case of warrantless wiretapping, has been described as requiring that the defendants establish ". . . (1) that they had a subjective good faith belief that it was constitutional to install warrantless wiretaps under the circumstances of this case; and (2) that this belief was itself reasonable." *Zweibon v. Mitchell,* 516 F.2d 594, 671 (Ct. of Appeals, D.C., 1975).

Applying the concept of what has been called the "Bivins" torts to some of the facts in this case, as alleged in the complaint (A156-162) which must be regarded as true for the purposes of

38. *Comment, supra* note 30, at 945.

39. As noted in *Comment, supra* note 30, at 949, for a police officer to be immune from suit, *Pierson v. Ray,* 386 U.S. 547, held the arrest had to be made with probable cause, which is a jury question, and there had to be a reasonable good faith belief that the arrest was authorized by a then-existing valid statute. It had been argued that *Bivins* turns the *Pierson v. Ray* test into a single test, namely, whether the police officer reasonably and honestly regards himself as in compliance with the law.

this action, ". . . plaintiffs and their affiliates were sharply critical of the staff and operations of defendants and carried on a vociferous campaign for the reform of the defendant Commodity Exchange Authority to obtain more effective regulation of commodity trading." (A156-157). Defendants, in order to stop these activities of the plaintiffs, did bring on unauthorized proceedings, issue illegal and punitive administrative orders, in order to discourage the respondents-plaintiffs' free speech, and ". . . the defendants discouraged and chilled the campaign of criticism plaintiffs ANE and ANE Inc. directed against them, and thereby deprived the plaintiffs of their rights to free expression guaranteed by the First Amendment to the United States Constitution." (A160).

Indeed, in a related case, in which the respondents-plaintiffs sued some of the petitioners-defendants, the Second Circuit Court of Appeals has held that the entire proceedings commenced by the petitioners herein were wrongful, for among other reasons, in that they were ". . . made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies. Under these circumstances, the finding of willfulness appears erroneous on the record taken as a whole, and the sanctions imposed unwarranted." *Economou, et al. v. U.S. Dept. of Agriculture,* 494 F.2d 519 (2d Cir. 1974).[40] Indeed, the Court of Appeals in that brief opinion held that it need not address most of the grounds which the respondents had alleged made those proceedings wrongful. Thus only one of the respondents' allegations was discussed.

In addition, as alleged in the complaint (A159), the defendants, by bringing unauthorized proceedings against the plaintiffs without notice or warning as required by law ". . . violated the rights and privileges of the plaintiffs under law

40. Found in Appendix B to the brief in opposition to the petition for a writ of certiorari.

and the United States Constitution, including their rights to due process of law." The defendants, who are the petitioners in this case, also brought on unauthorized proceedings when the respondents were no longer subject to their jurisdiction (A159), which proceedings were in excess of their lawful authority, and thereby deprived the plaintiffs-respondents of due process of law.

If police officers can be held liable for warrantless searches where no crime was committed in their presence, then certainly executives of a federal agency, conspiring to deprive an individual of his freedom of speech in order to protect what they deem is their position in the government, who also violate due process of law by bringing on unauthorized proceedings, without fulfilling the statutory requirements, against those not subject to their jurisdiction, must also be subject to suit for violation of the constitutional rights of those injured by such acts.

Furthermore, as alleged in the complaint, the defendants did ". . . in excess of their regulatory authority and their discretionary functions and powers . . . issue administrative orders, illegal and punitive in nature, against the plaintiffs after plaintiffs ANE and ANE Inc. were no longer subject to their authority, deliberately causing the plaintiffs substantial personal and economic harm . . ." (A159). If indeed the defendants did what has been alleged in the complaint, namely, issue illegal and punitive administrative orders in order to cause the plaintiffs substantial commercial harm, and to abridge their rights to free expression, it is beyond peradventure that they are liable to suit. It is also quite possible that if they did these things, they are acting outside the scope of their authority. In fact, by failing to issue the warning letter and taking immediate action, despite the fact that it was admitted that if a warning letter had been issued the respondents would have corrected any alleged deficiencies, there is already a strong presumption that malice or gross negligence amounting to malice was involved in the actions of these defendants-petitioners against the plaintiffs-respondents.

As this Court has said with regard to a school board member, he is not immune to liability, for damages ". . . if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected. . . . A compensatory award will be appropriate only if the school board member has acted with such an inpermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Wood v. Strickland,* 420 U.S. 308, 322 (1975). In this case, we have such lack of good faith.

It has been strongly suggested that this Court incorporate the doctrine of *respondeat superior* into federal common law under §1331 in order that the actual agencies who employ the individuals who are being sued may be liable for suit.[41] Quite clearly, in any event, the respondents in this case have no absolute immunity for their actions in violation of the respondents' constitutional rights.

2. Liability of the petitioners for traditional torts.

In the area of traditional torts, certain officers have been held to have absolute immunity.[42] It has been said by certain well-known authors that: ". . . the strong tendency of the law seems to be that some officers have absolute immunity from liability for traditional torts but that officers with the same

41. *Comment, supra* note 30 at 977, *See also* p. 972, footnote 233, which lists the authorities that supports the proposition that: "The most satisfactory and compelling solution to the problem of compensating civil rights plaintiffs is to hold the governmental entity directly responsible for the acts of its officials."

42. Assume, for the purposes of this section, that all petitioners acted within the scope of their authority, for if not they are clearly subject to liability.

discretionary power have only a qualified immunity for a *Bivins* tort or for a violation of §1983."[43]

It has been suggested that the distinction between a traditional tort and a *Bivins* tort is not a good one. It is presently grounded primarily on the case of *Barr v. Matteo,* 360 U.S. 564, where it was held that a high-ranking officer was immune to suit for libel arising out of statements he made about two employees in a press release.[44] Aside from judges, prosecutors, and legislators: "The law of privilege as a defense by officers of government to civil damage suits for defamation and kindred torts has in large part been of judicial making. . . ." *Barr v. Matteo,* 360 U.S. 564, 569. This Court in the *Barr v. Matteo* opinion stated that this privilege was not confined to heads of executive departments, for as the Court said:

> "To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with much less sweeping functions. That is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond to damages is entrusted, the relationship of the act complained of to 'matters committed by law to his supervision or control,'. . ." 360 U.S. at 573, quoting *Spalding v. Vilas* at 498.

43. K. Davis, *Administrative Law of the Seventies (*supplementing *Administrative Law Treatise)* 583 (June 1976). Davis also suggests that "such law probably cannot endure." *Id.*

44. *See also Spalding v. Vilas,* 161 U.S. 483 (1896), wherein a cabinet officer, the Postmaster General, was granted absolute immunity from suit.

Even in the *Barr v. Matteo* opinion, this Court had stated that although they held the petitioner absolutely privileged, "the question is a close one, but we cannot say that it was not an appropriate exercise of the discretion with which an executive officer of petitioner's rank is necessarily clothed to publish the press release here at issue in the circumstances disclosed by this record."[45]

The petitioner in the *Barr v. Matteo* case was the acting director of an important government agency, and as such he was clothed with very substantial duties conferred by the President by Title II of the Housing and Rent Act.[46] His integrity had been challenged, as had that of his agency, on the floor of the Senate and been given wide publicity. Certain correspondence apparently had been sent to a Senator over the petitioner's signature and incorporated into the Congressional Record without his knowledge, which could reasonably be read as defending a position different than the one he had taken at the beginning of the matter. Therefore, his publicly expressed statement, this Court held, announcing personnel actions which he planned to take in reference to widely disseminated public charges was an appropriate exercise of discretion which an officer of that rank must possess if he is to function ably in public.[47] Thus, in the traditional tort area, aside from the special situations of judges, prosecutors, and legislators acting within the scope of certain authority, important officials exercising discretion are immune from suit.

Applying the *Barr* case to the facts in this case, one can hardly see where any immunity at all could be granted to any of the defendants with the exception perhaps of the Secretary of Agriculture. It is alleged that defendants-petitioners did release a

45. 360 U.S. at 574.

46. *Id.*

47. 360 U.S. at 574, 575.

deceptive press release falsely indicating that respondents' financial resources had deteriorated when the defendants-petitioners knew that the statement was untrue and acknowledged that said statements were untrue. Said deceptive press release damaged certain of the respondents' credit standing and affected the willingness of customers to do business with the respondents. In addition to the tort of libel, abuse of legal process, malicious prosecution, invasion of privacy, negligence, and trespass are all torts which are alleged in the complaint (A156-161).

3. Torts committed outside the scope of the authority of government officials.

It is beyond peradventure that the complaint alleged that the defendants acted both within and without the scope of their authority. Furthermore, it is quite clear that no affidavit accompanied the defendants-petitioners' motion to dismiss in this case. Indeed there is no knowledge as to who performed certain functions and exactly what functions they performed in this case except affidavits belatedly injected into these proceedings by two of the petitioners, namely, T. Reed McMinn and Richard W. Davis, Jr. (A141-149). These affidavits state in conclusory form the role certain of the petitioners were alleged to have with regard to the wrongful attacks and proceedings brought against the respondents. If these allegations, as alleged by such affidavits, are to be regarded as a full statement of what occurred in these proceedings, without the opportunity to fully examine the facts and documents, then there indeed would never be much use for any legal proceedings. Parties could, by *ex parte* affidavit, place themselves in a position as to be completely outside the scope of the judicial process. Clearly the law never intended developments of this type. For the acts outside the scope of their authority, the petitioners are in the situation of any other individual before the law, namely, they are liable for their torts pursuant to law.

II.

THE HOLDING BY THE SECOND CIRCUIT COURT OF APPEALS IN THIS CASE IS IN ACCORD WITH THE PRESENT STATE OF THE LAW.

The petitioners seek to allege facts based on an affidavit of one Richard W. Davis, Jr. (A142). Said affidavit, which does not in fact appear in the relevant docket entries (A1, 2, 3), and which counsel for the respondents originally objected to, was apparently eventually found and is now made part of this file. Said affidavit was not before the court during the proceedings in the district court wherein the defendants-petitioners moved to dismiss this action, and said affidavit, the respondents allege, in large part does not reflect the true facts of this case. In fact, the respondents most clearly allege that in view of the fact that this entire matter is based on a motion to dismiss, unaccompanied by any affidavits whatsoever, the respondents are entitled to have this matter remanded.

The Court of Appeals, Second Circuit, reversed the dismissal of this action by the district court and remanded the case for further proceedings consistent with the opinion (Petition for a Writ, Appendix A, p. 1a). Judge Mansfield of the Second Circuit cited *Pierson v. Ray,* 386 U.S. 547 (1967) for the proposition that pursuant to a suit under 42 U.S.C. §1983, policemen were ". . . limited to the qualified common law immunity which had been extended to them prior to section 1983, *i.e.,* the defense that they acted in good faith and with proper cause. . . ." In the same case the immunity of judges was upheld. Furthermore, Judge Mansfield cited *Scheuer v. Rhodes,* 416 U.S. 232 (1974) for the proposition that the Governor of Ohio and other state officials were at most entitled to a qualified "good-faith, reasonable grounds" immunity, the scope of which would depend upon "the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983." The

Court in *Scheuer,* as quoted by Judge Mansfield held that the qualified immunity available to officers of the executive branch depends upon

> ". . . the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Economou v. U.S. Dept. of Agriculture,* 535 F.2d 688, 692, quoting *Scheuer.*

Since there was no factual record before the court, as Mansfield noted, in the *Scheuer* case, that matter was remanded. The Second Circuit opinion points out that several other circuits have followed the good-faith, reasonable grounds standard as governing scope of immunity,[48] including the Fifth Circuit with regard to local elective officials, the District of Columbia Circuit with regard to Justice Department officials, the Fourth Circuit with regard to the Secret Service Director, the Fourth Circuit with regard to the Treasury Secretary, the Eastern District of Pennsylvania with regard to the Attorney General of the United States.

The Second Circuit further noted that the qualified "good-faith, reasonable grounds" standard was more recently affirmed by this Court in *Wood v. Strickland,* 420 U.S. 308 (1975), which dealt with state school administrators' and school board members' liability to damage. The Second Circuit did not determine whether the qualified immunity standard required

48. *See* Second Circuit opinion, footnote 3, found in petition for a writ, page 11a.

that the defendants be charged with knowledge of the clearly established constitutional rights of the plaintiffs, or as held by four members of the Court in *Wood v. Strickland,* whether in light of the discretion and responsibilities of his office and under all circumstances, the acts appeared to be at the time reasonable and in good faith. The Second Circuit opinion stated:

> "Application to this case of the qualified immunity standard of either the majority or of the minority in *Wood v. Strickland* would call for reversal in the present posture of the case."

The Second Circuit opinion cited *Imbler v. Pachtman,* 424 U.S. 409, holding that a prosecutor enjoys virtual immunity from §1983 suits for damages when he acts within the scope of his judicial duties.[49]

The Second Circuit opinion went on to say that officials engaged in initiating and hearing administrative proceedings, while enjoying considerable immunity at common law, did not enjoy the scope granted judges, legislators, and prosecutors. The Second Circuit opinion stated that state courts persistently, even in formal action taken by an administrative tribunal, have held that officials could be responsible for tortious conduct if their acts had been undertaken with malice. Good faith mistakes in judgment were sometimes also held sufficient to afford grounds for suit. The court went on to lay out the reasons which judges, prosecutors, and legislators are granted immunity. But as the Second Circuit stated:

> "When it comes to suits against officials of the executive branch of a government, however, there does not appear any such obvious need for absolute immunity, as distinguished from a

49. As has been noted in this case, the allegations are that the individual petitioners-defendants acted both within and without the scope of their official duties.

> qualified immunity to insure performance of their essential government functions. For the most part, the discretionary powers of officials in the executive branch are more circumscribed than are those of legislators, prosecutors, or grand jurors. Unlike the judge, the official or employee of a department of the executive branch of a state or federal government upon being sued for damages, would not face a conflict of interest if the state or federal government followed its usual practice of agreeing to provide him with representation by counsel drawn from the executive branch. For these reasons the trend, as reflected in *Scheuer v. Rhodes, supra,* and *Wood v. Strickland,* has been toward the view that a qualified rather than absolute immunity is sufficient to insure the functioning of the executive branch and at the same time to protect the public against abuse of official power." 535 F.2d 688 (Petition for Writ, Appendix, pp. 16a, 20a).

Thus the Second Circuit held that the individual defendants in this case can adequately perform their executive duty by availing themselves of the defense of qualified "good-faith, reasonable grounds" immunity of the type approved by the Supreme Court in *Scheuer v. Rhodes.*

The court's opinion further held that the defendants can avail themselves of motions for summary judgment in order to expedite legal proceedings when faced with suits having no factual basis.

III.

PETITIONERS' ARGUMENT DOES NOT ACCORD WITH THE LAW OR ITS TRENDS.

The petitioners in this case argue that pursuant to the rule of *Barr v. Matteo*, 360 U.S. 564, federal government officials have absolute immunity from damage suits based upon the performance of their official duties (Brief for the Petitioners, p. 9). The petitioners ignore the fact that the allegations in the complaint, which for purposes of this action must be regarded as true, allege that the defendants acted both within and without the scope of their official responsibilities.

A. Petitioners Misconstrue *Barr v. Matteo* and *Doe v. McMillan*.

The petitioners argue that "a majority of the Court in *Barr* and *Howard* [*v. Lyons*, 360 U.S. 593] thus recognized the absolute immunity doctrine for federal officials." In fact, however, *Barr v. Matteo* did not assert that federal officials have absolute immunity. *Barr v. Matteo* was a libel action against a government official. Four justices joined in the opinion written by Mr. Justice Harlan; a concurring opinion was rendered by Mr. Justice Black, and there were four dissenting opinions. The defendant, Rent Stabilization Director, had issued a press release about his intent to dismiss certain subordinate employees under his jurisdiction, because policies they had been involved in were severely criticized by Congress. This Court held in that case that government officials' privilege to civil damage suits for defamation and kindred torts cannot ". . . properly be restricted to executive officers of cabinet rank. . . ." *Barr v. Matteo*, 360 U.S. 564, 572. This Court asserted that immunity comes about by relation of the act complained of to the matters committed by law to the government officials' control or supervision. And while the Court held that the question was a close one, within the scope of the particular high-ranking officers' authority and

under the circumstances of the *Barr* case, the Rent Stabilization Director was immune to suit for libel. In other words, a high-ranking official of a federal agency was immune to suit under the special facts of that case for libel. The Court never stated that all federal officials are immune under all circumstances from libel suits, or indeed any other tortious accountability. *Barr v. Matteo* did not even hold that an executive head of a federal department would be immune from libel suits under all circumstances. Thus to assert that *Barr v. Matteo* afforded government officials absolute immunity seems to be a misreading of the plurality opinion.

In fact, the *Barr v. Matteo* case is further clarified by the decision of this Court in *Doe v. McMillan*, 412 U.S. 306 (1972). As the Court noted:

> "Also, the court determined in *Barr* that the scope of immunity from defamation suits should be determined by the relationship of the publication complained of to the duties entrusted the officer." 412 U.S. 306, 319-320.

The Court in *Doe* goes on to say that: "The scope of immunity has always been tied to the scope of. . . authority." 412 U.S. 306, 320.

Article 1, §6 of the United States Constitution provides in part that: "[A]nd for any speech or debate in the House [Senators and Representatives] shall not be questioned in any other place." Thus the question of the legislative immunity of members of Congress, and, as we shall see, executive immunity, is the issue in *Doe v. McMillan*. Such immunity, unlike any alleged immunity in the case at bar, is provided in part by the Constitution. In the *Doe* case there was a congressional committee investigation which was conducted pursuant to congressional authority, and a report was submitted by said committee to the Government Printing Office to be printed and

distributed. The plaintiffs attempted to enjoin the distribution of the report because it contained, they asserted, defamatory and objectional material. Both the district court and a divided United States Court of Appeals for the District of Columbia held that there was absolute immunity to publish said report. *Doe v. McMillan* stated at 412 U.S. 306, 313:

> "Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause."

For example, the Court noted that congressional attempts to influence the Executive Branch is not protected activity:

> "Nor does the Speech and Debate Clause protect a private republication of documents introduced and made public at a committee hearing, although the hearing was unquestionably part of the legislative process." 412 U.S. at pp. 313-314.

While public dissemination may serve a legislative purpose such as informing the public, it is not necessarily protected speech. 412 U.S. at p. 314.

The Court further stated on p. 315:

> "Members of Congress are themselves immune for ordering or voting for a publication going beyond the reasonable requirements of the legislative function, *Kilbourn v. Thompson, supra,* but the Speech or Debate Clause no more insulates legislative functionaries carrying out such non-legislative directives than it protected the Sergeant at Arms in *Kilbourn v. Thompson* when, at the direction of the House, he made an arrest that the courts subsequently found to be 'without authority.' "

Therefore, in the case at bar, even if there is some immunity, it is clear that those carrying out the order to distribute the harmful press releases or those unlawfully prosecuting the plaintiffs-respondents, Arthur N. Economou and Arthur N. Economou and Co., Inc., are not immune from liability.

This Court further said that:

> "Thus, we cannot accept the proposition that in order to perform its legislative function Congress not only must consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to private reputation that material might be." 412 U.S. at 316.

If Congress, with constitutional protection, cannot disseminate actionable material without liability, how possibly can the defendants in this case be immune to suit for release of actionable information?

The Court clearly said again in discussing *Barr v. Matteo* that it ". . . confers immunity on government officials of suitable rank. . ." for limited purposes. 412 U.S. at 319. Can it reasonably be contended that all defendants here are of suitable rank and authority as to be immune to suit?

This Court also asserted that it wrote in the shadow of two recent cases ". . . where the Court advised caution '[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him'. . . ." 412 U.S. at 324, citing *Wisconsin v. Constantineau,* 400 U.S. 433 (1971) and *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972).

Thus the assertion by the petitioners that: "The issue before

the Court, therefore, is whether the doctrine of absolute immunity set forth in *Barr* is to be continued, or whether a qualified immunity is adequate to protect federal officials in the performance of their duties" (Brief for the Petitioners, p. 16), is not, it is respectfully urged, the issue before this Court. In fact, *Barr* never did say that all federal officials enjoy absolute immunity from suit. Therefore, where the petitioners go on to argue in their brief that the absolute immunity doctrine is based upon good public policy, there is, in fact, no absolute immunity doctrine for all federal officials and never has been, with the exception of certain acts of prosecutors, judges, and legislators within the scope of certain aspects of their authority.

The assertion that *Doe v. McMillan* placed a gloss upon *Barr* (Brief for the Petitioners, p. 23) does not appear to the respondents to be a correct analysis of what occurred. It seems that *Barr* and *Doe v. McMillan* both held that immunity only lay in the facts as discovered, with those federal officials operating in an area of discretion or policy-making. Those administering policy would not be immune to suit except insofar as limited "good-faith" and "reasonable" immunity was available to said federal officials.

The petitioners go on to argue in their brief, somewhat inconsistently, that in fact even under the old doctrine of *Barr v. Matteo,* an official is immune only if his duties involve a significant element of discretion.

B. Legislative Trends Support an Elimination of Aspects of Immunity.

Aside from the opinions of this Court, there have been numerous legislative acts which have taken into consideration the growth of government in the United States, and its impact on the lives of the citizens of this country. As a result of the fact that the federal, state and local governments have grown in size, the average citizen is much affected in his daily life by large

bureaucratic organizations. In part as a result of these circumstances, not only this Court but also Congress has recognized the fact that the individual citizen must be given redress against wrongful acts of officials.

Thus as the Committee on the Judiciary pointed out (14 U.S.C., Congressional and Administrative News, December 3, 1976, p. 6560):

> "Based on the testimony presented to this committee and to the Senate committee, it appears that the consensus in the administrative law community among scholars and practitioners is strong with regard to the elimination of sovereign immunity."

The Committee on the Judiciary stated that while there have been substantial strides towards establishing monetary liability on the part of government for wrongs against the citizens by the Tucker Act of 1875 and the Federal Torts Claims Act of 1946, legislation designed to hold government agencies more strictly accountable ". . . will strengthen this accountability [of the federal government] by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment or writ of mandamus." *Id.*, pp. 6556, 6557.

Thus the amendments to 5 U.S.C. §702 by Public Law 94-574, while not directly relevant to this case, do broaden the scope of judicial authority available to the courts. As noted by the Committee on the Judiciary (House Report No. 94-1656), the amendment to 5 U.S.C. §702 was "supported by a wide range of organizations and agencies, including the American Bar Association, the Federal Bar Association, the Environmental Defense Fund, the Judicial Conference of the United States, and the Department of Justice." (14 U.S.C., Congressional and Administrative News, December 3, 1976, p. 6556.).

In addition to this particular statute, 28 U.S.C. §1331 was amended by Public Law 94-574, 90 Stat. 2721, on October 21, 1976 to eliminate the requirement of a specific amount in controversy as a prerequisite to maintenance of any §1331 action brought against the United States or an agency thereof. Thus as 28 U.S.C. §1331 now reads:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any *agency thereof, or any officer or employee thereof in his official capacity.*" (Emphasis supplied.)

Quite clearly, the legislative trend and the judicial trend has been to narrow the scope of official and sovereign immunity.[50]

C. *Scheuer* v. *Rhodes* May Be Construed To Posit a Single Standard for Liability of Federal Officials Under the Constitution and Other Laws and State Officials Under Section 1983 Suits.

The petitioners argue that *Scheuer v. Rhodes,* 416 U.S. 332 (1974) does and should apply only to state officials. There is nothing expressly or impliedly included in the *Scheuer* decision that has given the lower federal courts reason to believe that this Court would hold federal executive officials are entitled to any different scope of immunity than state officials. The various courts of appeals have certainly not felt that *Scheuer* left them free to apply absolute immunity whenever federal officials were

50. *See also* 28 U.S.C. §2680(h), amended by Pub. L. 93-253, 88 Stat. 50, allowing suits for certain intentional torts committed by investigative or law enforcement officers.

involved. In fact, in almost all cases they have interpreted *Scheuer* to apply to both federal and state officials.[51]

The *Scheuer* holding specifically asserted that:

> "Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint." 416 U.S. at 250.

As noted above, the motion to dismiss that the petitioners brought before the district court was not even supported by an affidavit. The petitioners seek to obviate this very essential problem by asserting that there was a previous affidavit with regard to a previous motion in the file in the case at bar. The petitioners' previous affidavit, having been prepared years earlier, was relevant, if at all, merely to the question of whether or not the petitioners should have been preliminarily enjoined from conducting their attack on the respondents. That affidavit, on an *ex parte* basis, alleging certain facts as to the activities of certain defendants, is hardly relevant.

No affidavits were presented with the motion to dismiss. And as this Court has held, the complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.

The reasons that apply to the grant of immunity found in *Scheuer v. Rhodes* should apply equally to both state and federal officials. The reasoning in *Scheuer v. Rhodes,* which held the matter to be premature when determined merely on a motion to dismiss apply equally to the case at bar.

51. *See,* for example, *Mark v. Groff,* 521 F.2d 1376 (1975); *Apton v. Wilson,* 506 F.2d 83 (1974); *States Marine Lines, Inc. v. Schultz,* 498 F.2d 1146 (1974); *Rowley v. McMillan,* 502 F.2d 1326 (1974); *Black v. United States,* 534 F.2d 528 (1976); *Bivins v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 456 F.2d 1339 (1972), the latter a pre-*Scheuer* decision.

IV.

THE PREFERRED POLICY IS A UNIFORM STANDARD FOR LIABILITY OF BOTH FEDERAL AND STATE OFFICERS.

A. The Rule of Law.

The concept of the equal applicability of law to all persons, regardless of status, has origins in the Old Testament, and of somewhat recent vintage, English law. In the well-known words of Dicey:

> "In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." Dicey, *The Law of the Constitution,* 189 (8th Ed., 1915).

This concept of the "rule of law" is fundamental to our society. In fact, it has recently been held that even the President of the United States, the Attorney General of the United States, and other federal officials are liable for their illegal acts, committed in violation of the constitutional rights of others. *Halpern v. Kissinger,* 424 F. Supp. 838, 844 (1976).[52]

The court in that case held that absolute immunity was unavailable to the defendants ". . . for their excessive improper actions." 424 F. Supp. 838, 845. The court further held that:

52. The court rejected former President Nixon's motion to dismiss which was ". . . grounded upon the assertion that his discretionary conduct in office presents a non-justiciable issue or a political question." 424 F. Supp. at 844, footnote 8.

> "As to these defendants [Nixon, Mitchell and H.R. Haldeman], no objective good faith defense is available. The Court finds their activities relating to the wiretap continuance unreasonable and in violation of established Fourth Amendment rights." 424 F. Supp. 838, 845.

It has also been recently held in a defamation suit that even though the defendant Smithsonian Institution was absolutely immune from suits for intentional tort under the Federal Torts Claims Act, the Chairman of the Department of Anthropology at the Smithsonian Museum of Natural History was only entitled to a qualified immunity in a defamation suit. *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian,* Civ. No. 74-1899 (D.C. Cir., Oct. 20, 1976).[53]

The argument made by certain scholars that somehow the reasonable good faith privilege would chill on the job performance and make capable individuals leave the government work force is not persuasive. One writer has argued that:

> "These individuals, otherwise faced with potential liability, might be reluctant to leave the safer environs of the private sector. Such reluctance could deprive the public of the services of many talented people."[54]

In fact, those in the private sector are subject to liability for their torts. And indeed, if they have breached the constitutional rights of citizens, they may have meandered into criminal liability. The increased liability of even outside directors

53. *See also Henderson v. Bluemink,* 511 F.2d 399 (D.C. Cir. 1974), where the Court of Appeals for the District of Columbia refused to grant an Army doctor absolute immunity for negligence.

54. *Comment, Governmental Immunity — Degree of Immunity Applicable to Government Executive Officials in Defamation Suits,* 50 *Temple Law Quarterly* 191, 202 (1976).

of public corporations for the actions of said corporations is well known. How the private sector is to be deemed safer than the public sector is difficult to understand. The courts and statutes have put certain bars in the way of permitting corporations to reimburse certain corporate officers for wrongs they have committed. The enforcement of criminal penalties for violations of certain antitrust acts are part of the hazards of the private sector. Certainly, it has generally been the public sector that has been considered the safe sector. It is certainly preferable to have a rule of law that applies to all persons, rather than setting up all federal officials as a separate category, immune from redress for wrongs they have visited upon others.

B. There Is No Good Reason to Hold State Officials Under §1983 to a Different Standard Than Federal Officials Who Commit a "Bivins" Tort.

It has been noted that:

> "Furthermore, no distinction has ever been explicitly recognized in the cases between suits against state and against federal officers, since rationalization has proceeded in terms of an abstract sovereign equally applicable to both types of case."[55]

And similarly, the courts have held that with regard to Internal Revenue Service agents:

> ". . . no significant reason for distinguishing, as far as the immunity doctrine is concerned, between litigation under section 1983 against state officers and actions against federal officers alleging violation of constitutional rights under the general federal question statute. In contrast,

55. Jaffe, *supra* note 1, at 23.

> the practical advantage of having just *one* federal immunity doctrine for suits arising under federal law is self-evident. Further, the right at stake in a suit brought directly under the Bill of Rights are no less worthy of full protection than the constitutional and statutory rights protected by section 1983. Accordingly, we agree with several courts of appeals in holding that the official immunity doctrine in suits against federal officers for violation of constitutional rights is identical to the immunity doctrine applied in section 1983 suits." *Mark v. Groff,* 521 F.2d 1376, 1380.

The Ninth Circuit Court thus held that the IRS agents were only entitled to a qualified immunity for acts performed in the course of their official conduct.

The United States Court of Appeals for the District of Columbia, in a suit against officials of the United States Department of Justice, expressly held that the reasoning of the *Scheuer* decision,

> ". . . considered in the context of the present case, mandates rejection of the District Court's implicit conclusion that the Justice Department defendants are shielded by an absolute immunity while performing official functions. We hold that a qualified immunity, having the same general character as that contemplated by the Supreme Court in *Scheuer,* is available to the Justice Department defendants in the present action. Such an immunity appropriately allows vindication of the Fourth and Fifth Amendment rights at stake, while preserving for the officials involved a shield against liability that will allow vigorous, legitimate use of power." *Apton v. Wilson,* 506 F.2d 83, 92-93 (1974).

The *Apton* court further stated that the defendants in that action,

> ". . . unlike the state officials in *Scheuer,* are the highest officers of a Federal executive department. The difference in office is relevant, for immunity depends in part upon 'scope of discretion and responsibilities of the office,' *Scheuer v. Rhodes, supra,* 416 U.S. at 247, 94 S. Ct. at 1692." 506 F.2d at 93.

The court in that case held that even with respect to the Attorney General:

> ". . . the absolute immunity often accorded prosecuting attorneys cannot shield the defendants in this case, for the prosecutor's absolute protection, like that of the judge from which it is derived, is both justified and bounded by the judicial traditions and procedures that limit and contain the danger of abuse." 506 F.2d at 92.

The Court of Appeals in the Fourth Circuit stated that:

> "Although *Scheuer* involved a suit against state executive officers, the court's discussion of the qualified nature of executive immunity would appear to be equally applicable to federal officers." *States Marine Lines, Inc. v. Schultz,* 498 F.2d 1146, 1159.

In *Rowley v. McMillan,* 502 F.2d 1326 (1974), the Fourth Circuit specifically applied *Scheuer* to a suit brought against federal officers for violation of First and Fourth Amendment rights.

Thus the lower courts have generally felt that *Scheuer* was to apply not only to state officials who were sued under §1983 but also to federal officials who were sued for at least "Bivins" torts, if not all intentional torts.

C. Immunities Granted Certain Officials.

Pierson v. Ray, 386 U.S. 547, extended the common law immunity of judges for acts committed within their judicial jurisdiction. *Doe v. McMillan,* 412 U.S. 306, analyzed and sustained the immunity granted by the Constitution to legislators for acts committed to their legislative responsibility. *Imbler v. Pachtman,* 424 U.S. 409, held that:

> "The common-law immunity of a prosecutor is based upon the same considerations that underlie common-law immunities of judges and grand jurors acting within the scope of their duties." 424 U.S. at 422, 423.[56]

This Court pointed out, in analyzing whether this common law immunity of a prosecutor should be extended to suits under §1983, that the threat of malicious prosecution by those prosecuted and found innocent, is rather substantial. This Court recognized the fact that genuinely wronged defendants are left without civil redress ". . . against a prosecutor whose malice or dishonest action deprives him of liberty." 424 U.S. 409, 427. This Court held that judges and prosecutors are not, however, beyond the reach of the criminal law.[57]

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56. *See also Yaselli v. Goff,* 12 F.2d 396 (1926), *aff'd. per curiam,* 275 U.S. 503 (1927); *see also* 424 U.S. at 423, footnote 20 for citations of the earliest cases granting immunity to a judge and holding that judge, grand juror and prosecutor exercise discretionary judgment on the basis of the evidence presented to them.

57. *See* 18 U.S.C. §242 quoted at 424 U.S. 429, footnote 28.

Where the prosecutor is acting solely as an investigator, this Court did not reach the issue as to whether or not he would be entitled only to a good faith defense as has been held by certain courts. In the *Imbler* case, however, and on the basis of the facts therein, this Court held that the prosecutor's ". . . activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." 424 U.S. 409, 430.

It is beyond cavil that prosecutors, judges, and grand jurors in functions directly connected with their judicial responsibility act in an area in which broad discretion must be exercised. Thus, in fact, these immunities have been referred to as quasi-judicial immunity.[58]

There is a constant thread running through all the major cases which have granted immunity, including *Barr v. Matteo, Doe v. McMillan, Pierson v. Ray,* and *Imbler v. Pachtman.* In these cases it is important that the officials concerned have the freedom to exercise certain types of discretion in order to effectively carry out their responsibilities under law. The legislators, judges, grand jurors and prosecutors, as well as high-ranking officials in policy-making positions, need discretion and relative freedom within that ambit of discretion, to effectively carry out their duties. However, as has been said in *Barr v. Matteo* and other cases, to determine whether the privilege of immunity may be asserted, not only the rank or position of the official and his responsibility, but also the acts he is performing, must be considered. As implied in *Imbler v. Pachtman,* it may not be necessary, and indeed it would probably be undesirable, to grant the prosecutor the same type of immunity when undertaking an investigation, as he has or must have in making a decision on whether or not to prosecute. The reasonable good

58. *See Comment, Quasi-Judicial Immunity: Its Scope and Limitations in Section Nineteen Eighty-three Actions,* Vol. 1976 *Duke Law Journal* 95.

faith defense should be sufficient to protect the prosecutor in his investigatory functions.[59] It has been stated that:

> "Where, however, the nature of the activity is further removed from the actual courtroom process, the immunity is qualified like that of other executive officials."[60]

Thus this Court stated in *Imbler:*

> "We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under section 1983." 424 U.S. 409, 431.

The Court of Appeals for the Seventh Circuit has held that planning and executing a raid wherein deadly force was used has no greater immunity for the state's attorney than other police activities. *Hampton v. City of Chicago,* 484 F.2d 602, *cert. denied,* 415 U.S. 917.

Thus where the type of discretion that is required in a decision to prosecute and during prosecution is not needed, then clearly the prosecutor can be left to his reasonable good-faith defense without jeopardizing his discretionary powers.

It has been said with relation to judges that the origins of the concept of judicial immunity was the desire to cloak the

59. It may also be that if the prosecutor goes too far in a particular case, wherein he knowingly and deliberately withholds evidence that would be exculpatory, and deliberately and knowingly presents false and misleading testimony relating to the same piece of evidence, his acts may so shock the conscience, as to perhaps put him outside the protection of immunity. This would seem to be the holding in *Hilliard v. Williams,* 516 F.2d 1344 (6th Cir. 1975).

60. *Comment, supra* note 58, at 108, citing *Briggs v. Goodwin,* 384 F. Supp. 1228 (D.D.C. 1974).

proceedings with a certain rectitude and dignity.[61] Thus the litigant could attack the record but was restrained from challenging the judge's conduct of the proceedings.[62]

While the prosecutor may be immune from suit for certain of his activity where he is closely associated with the judicial process, as the judge may also be immune, their roles vary substantially from the quasi-judicial officer that is being sued in this action. While the administrative hearings that take place in many agencies retain the form of judicial proceedings, it is quite common for the so-called judicial officers to be very closely associated with the agency, to be housed with the agency, to receive a pension and promotion from the agency, and in general to lack that type of independence which is so essential to adjudicatory proceedings before state and federal courts.[63]

The assertions by certain authors[64] fail to recognize the fact that the Commodity Exchange Act was amended by the

61. *Comment, supra* note 58, at 114.

62. It has been argued that prosecutors do not in fact have the same type of judicial functions that should entitle them to immunity from prosecution under the common law. *Comment, supra* note 58, at 118.

63. But *cf. Comment, Federal Officers — Scope of Immunity From Damage Actions Available to Administrative Agency Officials,* 30 *Rutgers Law Review* 209. This note, which is replete with factual errors, including erroneous citations to the Code of Federal Regulations, which provisions did not exist in the form quoted in the note at the time of the case, erroneous statements of the facts, including an assertion that "Economou failed by almost $25,000 to meet the minimum balance required," a finding never made by any court and only found in proceedings that were set aside as being clearly erroneous by the United States Court of Appeals for the Second Circuit, and the complete failure of the author to realize that the entire administrative proceedings had been overturned by the Court of Appeals for the Second Circuit. *See* footnote 5 on page 210 of said volume, where the author asserts: "It is unclear whether Economou perfected this appeal."

64. *Id.*

Commodity Futures Trading Commission Act in 1974, where an independent agency was set up because there was severe dissatisfaction with the way commodities were being administered under the old Commodity Exchange Authority. The relationship that existed among some members of the old authority was just the sort that Congress wished to eliminate when it established the new independent Commission.

Thus to fail to recognize that the so-called judicial officers perform functions in settings very different in most cases, and certainly in the case at bar, than do actual judges sitting in courtrooms, is clearly an important omission. The quasi-prosecutorial and quasi-judicial officials engaged in administrative proceedings also do not have the discretion that prosecutors and judges do in performing their functions.

In summation, while certain immunities may be necessary and desirable, particularly where broad discretion must be exercised, either by high-ranking officials or officials of a certain type, nevertheless, this immunity should be pleaded as a privilege, and liability should exist but for the existence of said privilege. The priviiege should only be applicable in a specific factual context, as both *Barr v. Matteo* and *Scheuer v. Rhodes* and other cases have held, wherein an analysis is made as to whether or not a particular official is performing the discretionary function for which the immunity would be available.

D. The Desirability of Granting a Remedy to Those Aggrieved by Wrongful Official Action.

The alienation of persons from their government and loss of a sense of attributions of legitimacy to the acts of government are in part the result of growth of government and the inability of the average citizen to deal with the substantial organizations that exist to administer government programs. The fact that the citizen, in addition, cannot achieve redress in the courts of law

against wrongful action by officialdom, is indeed a contributing element to this feeling of alienation that has been talked about on many levels of American society. The primary stumbling block to permitting recovery by citizens who are injured is the fact that the doctrine of *respondeat superior,* going back to old English law, has not been applied in cases where an official is an employee of an agency. In fact, if such a decision was set aside, which would be in keeping with the trends toward the abolition of sovereign immunity, and certainly in keeping with the reality of the American governmental system, persons could sue the agencies which employ officials who may act wrongfully, thus, on the one hand providing a solvent defendant, and on the other hand insulating the individual government employee from suit. As things now stand, when a federal employee is sued, if recovery is had against him, quite often special bills are necessary to compensate him for his loss. It would be both simpler and more just to give full recognition to the modern concept of *respondeat superior.*

Jaffe argued that the discretionary immunity, although a valid one, should only be a presumptive barrier to relief. He felt that when the breadth of official privilege became intolerable, and when the plaintiff suffered heavy accrued losses, the recovery should be permitted not merely against the officer, unless his act was "palpably *ultra vires*" but from a responsible defendant, namely, a bonded official or the treasury itself. Since, as many authors have noted, an officer who is found liable under the law is ordinarily indemnified by the treasury, it is difficult to see why it is alleged that ". . . in the absence of bad faith, [one should not subject] . . . to a liability an officer who is required by law to exercise discretion."[65]

The argument that where an officer exercises discretion, if he is liable for suit, it will chill his ardor, has also been subject to some analysis. It has been stated that it will have the advantage of curbing the reckless official and the disadvantage of

65. Jaffe, *supra* note 27, at 223.

encouraging the over-cautious.[66] Obviously, however, this argument is weak where malice is proved against the officer. It has been further argued that if in fact awarding damages against an officer who has made an erroneous judgment will dampen his enforcing ardor, the Legislature can easily solve this problem by providing indemnity or a direct charge on the treasury.[67] Jaffe asserts that the primary reason for holding officers liable is ". . . but to find a conduit to the treasury in cases where there should be compensation and where no other device is provided."[68]

Indeed, if we are to maintain the tradition that has been so much in evidence these past few years, that no man is above the law, and that the government is indeed the servant and not the master of the people, then it is desirable to do away with the ancient notion that merely because the King could do no wrong, his servants could not do it for him. It is clear that the sovereign can and does do wrong, and that aggrieved citizens, in keeping with the traditions of our society, are entitled to a remedy for the wrongs inflicted upon them. This particular case affords this Court an opportunity to examine and confront these questions. But of course these questions are not abstract questions, because in this case individuals were actually seriously harmed by the wrongful actions of officials who both breached the civil rights and other duties which they had towards the respondents herein.

66. Jaffe, *supra* note 27, at 224.

67. Jaffe, *supra* note 27, at 227. *See also Miller* v. *Horton,* 152 Mass. 540, 26 N.E. 100 (1891), where Justice Holmes ruled in favor of recovery and held that reasonable grounds was not a defense where property was summarily destroyed, which property in fact should not have been destroyed, since it was not tainted.

68. Jaffe, *supra* note 27, at 228.

E. This Case Should Be Remanded To the Court Below.

This case was originally dismissed by the district court in the absence of any discovery and without even affidavits supporting the motion to dismiss. Since that dismissal, no discovery has been permitted by the district court pending a disposition of this case by this Court.

In general, it has been held that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45. Motions to dismiss are generally disfavored in federal courts. *Pond v. General Electric Co.,* 256 F.2d 824, 826-827; *Williams v. Gorton,* 529 F.2d 668. The allegations of the complaint must be accepted as true for the purposes of this appeal. *Mark v. Groff,* 521 F.2d 1376, 1378.

Even pursuant to a motion for summary judgment, the respondents-plaintiffs would ". . . have an opportunity to proceed under Rule 56 including motion for discovery, to establish a genuine issue as to a material fact." *Apton v. Wilson,* 506 F.2d 83, 95, n. 13.

As it has been held by this Court:

> "[T]he scope of immunity will necessarily be related to facts as yet not established either by affidavits, admissions or a trial record. Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983. . .". *Scheuer v. Rhodes,* 416 U.S. 232, 243.

This Court further concluded that:

> "Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint." 416 U.S. 232, 250.[69]

While this case is clearly not a §1983 case, the same requirement of a factual examination is present here as it was in *Scheuer.*

Just as in the *Apton v. Wilson* case, where the defendants resisted discovery, the petitioners in this case, holding to the claim that they all enjoyed absolute immunity for all of their acts, have successfully resisted all discovery.

It is respondents' assertion that any immunity which may exist is a privilege that must be asserted and proved on the basis of the factual circumstances of the case at a trial or after discovery. The concept that *Barr v. Matteo* permitted absolute liability for all federal officials from all suits, which is a portion of the petitioners' argument in this case, and has been the means by which they have conducted the case in the courts below, has prevented this case from coming to this Court with any substantial factual record. The only serious issue that has been raised is whether or not, on the basis of the assertions in the complaint, the respondents can proceed to discovery and a trial.

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69. Circuit Courts of Appeal have also stated that a factual setting is necessary to evaluate what immunity, if any, exists in a particular case. "An assertion of a qualified immunity would have to be accompanied by further factual presentation concerning such matters as what the defendant knew about the nature of the demonstrations and the potential for disruption, what general arrangements were made between the defendants and those in direct command of the law enforcement personnel on the streets, and what the defendants knew about the actual conduct of the peace-keeping forces deployed during the demonstrations. The Justice Department defendants did not develop these matters in the District Court, but, consistent with their assertion of an absolute immunity, focused their presentations on showing the defendants were acting in an official capacity, and resisted the plaintiffs' efforts at further discovery." *Apton v. Wilson,* 506 F.2d 83, 94.

It is respectfully urged that this case should be remanded consistent with the opinion of the Court of Appeals, with instructions that the court is to regard both violations of constitutionally protected rights and tortious conduct as the equivalent of violations of §1983 by state officials. In addition, it is respectfully urged that the doctrine of *respondeat superior,* in its modern form, be given effect in this case and cases where suits have been commenced because of alleged wrongful acts of federal officials, so that the agencies which employ them can be held liable to suit.

CONCLUSION

It is respectfully urged that the judgment of the Court of Appeals (Petition, Appendix C) should be affirmed, except insofar as it dismisses the action as to the respondents' claims against the Department of Agriculture and the Commodity Exchange Authority (Petition, Appendix C, p. 5a). As to those entities, the decision shou'd be reversed and they should be held subject to suit. This matter should be remanded for proceedings consistent with such an opinion.

Respectfully submitted,

s/ David C. Buxbaum
LAW OFFICES OF
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FOR ARGUMENT

Supreme Court, U. S.
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No. 76-709

In the Supreme Court of the United States

OCTOBER TERM, 1977

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v.

ARTHUR N. ECONOMOU, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Respondent contends (Br. 23, 42-49) that giving federal officials absolute immunity from a suit for damages alleging a violation of constitutional rights would be inconsistent with *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, which held that there is a cause of action for damages based upon an alleged violation of the plaintiff's Fourth Amendment rights committed by a federal officer acting under color of his authority. There is no inconsistency.

a. This Court did not decide anything in *Bivens* with respect to the scope of the immunity of an officer sued for damages under the Fourth Amendment. The complaint in *Bivens* was based upon the defendant's alleged violation of that amendment. The district court dismissed the complaint on two grounds: that it "failed to state a cause of action," and that "in any event respondents were immune

from liability by virtue of their official position" (403 U.S. at 390, 397). The court of appeals affirmed solely on the ground that a violation of the Fourth Amendment did not give rise to a cause of action. This Court reversed, stating (403 U.S. at 389) that it was resolving the question "reserved" in *Bell* v. *Hood*, 327 U.S. 678, "whether violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does" (403 U.S. at 389).

Bivens argued in this Court not only the Fourth Amendment issue but also that the district court had erred in holding that the defendants were immune from suit because the acts upon which the complaint was based were done in the performance of their official duties (Brief for the Petitioner, No. 301, October Term, 1970, pp. 2, 16-24). The Court, however, expressly declined to decide the latter question, as the government had urged it to do (Brief for the Respondents, pp. 43-44), because "[t]his question was not passed upon by the Court of Appeals" (403 U.S. at 397-398).

In *Bivens* the Court thus followed its traditional practice of not deciding major questions that are unnecessary to its decision and that the lower courts have not decided. All the Court decided in *Bivens*—and all it had to decide to reverse the judgment of the court of appeals—was that the plaintiff had stated a cause of action based upon the defendants' alleged violation of his Fourth Amendment rights. It did not decide, but left it for the court of appeals to decide, whether that cause of action might fail because the defendants could assert immunity. There is no inconsistency between recognizing a cause of action but holding that certain persons have a defense to it.

Thus, even assuming *arguendo* that the holding in *Bivens* that a cause of action exists for violations of the Fourth Amendment also covers the different "constitutional torts" asserted in this case,[1] that decision would in no way be inconsistent with the ruling that the petitioners here have absolute immunity.

b. On remand in *Bivens*, the court of appeals decided that the defendants in that case did not have absolute but only qualified immunity, *i.e.*, that they could prevail by proving that they acted in good faith with a reasonable belief in the validity of their actions. 456 F. 2d 1339, 1341 (C.A. 2). Respondent argues that this ruling also establishes that petitioners here have only qualified and not absolute immunity. This argument is unsound.

i. The principal basis for the court of appeals' decision in *Bivens* was that the defendants there were nonsupervisory "federal police officers," agents of the Federal Bureau of Narcotics, who were being sued for an allegedly illegal search and arrest (456 F. 2d at 1341-1342). Relying upon *Pierson* v. *Ray*, 386 U.S. 547, 555, the court of appeals in *Bivens* recognized and adhered to the proposition that " '[t]he common law has never granted police officers an absolute and unqualified immunity * * *' " (456 F. 2d at 1346). Reasoning that this traditional rule "is equally

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[1]The complaint in this case alleges a violation not of the Fourth Amendment, but of the First and Fifth Amendments. The court below did not determine the legal sufficiency of these claims. Petitioners may move to dismiss for failure to state a claim upon which relief can be granted. See Rules 12(b)(6) and 12(h)(2), Fed. R. Civ. P.; cf. *Bell* v. *Hood*, 327 U.S. 678. The question whether alleged violations of the First or Fifth Amendment creates a cause of action for damages has not been definitively decided. See *Greenya* v. *George Washington University*, 512 F. 2d 556, 562-563 n. 13 (C.A. D.C.). But see *Dellums* v. *Powell*, C.A. D.C., No. 75-1974, decided August 4, 1977.

applicable to federal police officers" (456 F. 2d at 1346), the court of appeals held that such officers, "while in the act of pursuing alleged violators of the narcotics laws or other criminal statutes, have no immunity to protect them from damage suits charging violations of constitutional rights" (456 F. 2d at 1341).[2]

In so holding, the court of appeals recognized that "[i]t has long been the rule in this country that certain officers of the federal government, acting in their official capacities, are absolutely immune from lawsuits" (456 F. 2d at 1342). Under this rule the court stated that it had "two issues to resolve * * * (1) * * * is there a showing that the Narcotics Agents were acting 'within the outer perimeter of [their] line of duty'; and, if so, (2) were they alleged to be performing the type of 'discretionary' function that entitles them to immunity from suit" (456 F. 2d at 1343). Applying these criteria the court found that the agents were performing their official duties, but concluded that the actions for which the officers were sued—conducting a search and making an arrest—are "not deemed to be * * * discretionary function[s]" (456 F. 2d at 1346).[3]

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[2]Read in context, the court's reference to "no immunity" meant no *absolute* immunity. As noted in the text, the court of appeals also held in *Bivens* that defendants could prevail by proving that they acted in good faith and with a reasonable belief that their actions were lawful (456 F. 2d at 1347-1348). The court characterized these as elements of an affirmative defense. Subsequently, in *Scheuer* v. *Rhodes*, 416 U.S. 232, this Court characterized this defense as a "qualified immunity." Cf. *Pierson* v. *Ray*, *supra*.

[3]Relying on an earlier Second Circuit opinion (*Ove Gustavsson Contracting Co.* v. *Floete*, 299 F. 2d 655, 659, certiorari denied, 374 U.S. 827), the court of appeals in *Bivens* stated that the question whether an act is "discretionary" is really a question whether " 'the act complained of [is] the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability' " (456 F. 2d at 1345-1346). The court explained (*ibid.*) that

> [w]hereas it is true that a police officer must exercise some discretion in making an arrest, the fiction that this act is not discretionary is maintained because of the belief that the benefit to society derived from the protection of personal liberties outweighs the detriment of perhaps deterring vigorous police action.

In short, the court of appeals in *Bivens* did not reject the rule of absolute immunity established in cases such as *Barr* v. *Matteo*, 360 U.S. 564, but decided simply that, under established criteria, the rule of absolute immunity did not apply. In contrast, as we have explained at length in our opening brief (pp. 41-59), the traditional rule of absolute immunity is fully applicable to petitioners in this case. The record shows that all of petitioners' actions were taken as part of their official duties, and that they either involved the exercise of significant discretion or were taken at the behest of superior officials who would have been absolutely immune if they personally had taken the actions.[4]

ii. As a subsidiary, alternative ground for its decision, the court of appeals in *Bivens* stated that federal officials sued for constitutional torts should have the same im-

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[4]Respondent contends (Br. 27-28) that the affidavits upon which petitioners rely for this argument (A. 141-149) did not accompany petitioners' motion to dismiss and were not before the district court when it decided the motion. As we explained (Br. 8), however, these affidavits had been submitted in support of defendants' opposition to one of plaintiff's earlier motions for an injunction, and were part of the record when the motion to dismiss was filed. Petitioners' notice of motion to dismiss the complaint (A. 163) stated that the motion was based, "upon all prior proceedings and papers filed herein." Those prior proceedings included the application for an injunction, and those papers included the affidavits. The affidavits provided an adequate factual base for the district court's allowance of absolute immunity in this case.

munity as state officials sued under 42 U.S.C. 1983 (456 F. 2d at 1347). As we have explained in our opening brief (pp. 35-41; see pp. 57-59), however, neither this Court's decisions, nor logic, nor sound public policy requires that these two categories of government officials have the same immunity.

The immunity of state officials sued under 42 U.S.C. 1983 must be determined in light of the facts that Congress enacted that provision to make state officials answerable in federal court for violations of constitutional rights, and that the grant of absolute immunity to such officials would defeat that purpose (see our opening brief, pp. 35-41). But in cases such as this, where the causes of action are nonstatutory, there is no problem that absolute immunity might be inconsistent with and thwart legislative intent. The basic rationale of *Barr* v. *Matteo*, *supra*, 360 U.S. at 573—that absolute immunity for federal officials is necessary "to aid in the effective functioning of government"—can be given full force. Absent a contrary indication from Congress, that basic rationale should be reaffirmed and applied to petitioners in this case.[5]

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[5]Respondent argues (Br. 50-51) that holding federal officials liable is a means of finding a " 'conduit' " to the public treasury, because "an officer who is found liable under the law is ordinarily indemnified by the treasury * * *." But unless there is authorizing legislation, this assertion is incorrect. In general, federal agencies have no authority to indemnify officials for damage awards arising out of their official duties, and a private bill would be necessary to have Congress indemnify the officer.

The Attorney General of the United States recently has proposed legislation that would expand the basis upon which the United States can be held liable under the Tort Claims Act for the conduct of its employees. See H.R. 9219, 95th Cong., 1st Sess. (1977); S. 2117, 95th Cong., 1st Sess. (1977). The proposal, *inter alia*, would make the United States suable "where the claim sounding in tort for money damages arises under the Constitution * * *" (Section 2 of H.R. 9219, *supra*), and would make this remedy against the United States "exclusive of any other civil action or proceeding * * * against the employee * * *" (Section 5 of H.R. 9219, *supra*). In a letter to The Speaker of the House, dated September 16, 1977, the Attorney General explained that "one of the main purposes of the [exclusivity provision] is to improve employee morale and foster good faith [and] vigorous performance of duty, unimpaired by the threat of personal involvement in a lawsuit."

2. Two recent court of appeals' decisions rendered after the filing of our opening brief have held that federal officers have absolute immunity for discretionary action taken as part of their official duties. Their reasoning is equally applicable to the present case.

a. In *Huntington Towers, Ltd., et al.* v. *Franklin National Bank, et al.*, C.A. 2, No. 76-6109, decided July 19, 1977, petition for a writ of certiorari filed, October 17, 1977 (No. 77-564), the Second Circuit held that the Comptroller of the Currency has absolute immunity in a suit against him for damages for his failure to declare a bank insolvent. Citing *Barr* v. *Matteo*, the court followed the "well settled" rule "that federal officials are not personally liable for alleged torts based upon acts committed within the scope of their official duties requiring the exercise of judgment or discretion * * *" (slip op. 4789). The court apparently limited its decision in the present case, when it stated that "*Economou* * * * does not purport conclusively to bar the availability of absolute immunity," "[b]ut * * * contemplates examination of the discretionary function performed by the individual official * * *" (slip op. 4789, n. 2). The court held that "the breadth and character of the discretion exercised by the Comptroller * * * makes this a clear case calling for granting absolute immunity" (*ibid.*).

b. In *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution, et al.*, C.A. D.C., No. 74-1899, decided September 16, 1977, the District of Columbia Circuit, sitting *en banc*, reaffirmed that a government official acting within the scope of his duty has absolute immunity when sued for libel. The court stated that "[t]he federal common law rule of absolute immunity * * * furthers the goal of effective administration of government in the public interest. A qualified immunity would be dependent upon a myriad of factors and a particularistic assessment of the facts of each case, leaving an official at hazard to anticipate whether or not he is protected" (slip op. 4-5; footnotes omitted).

Although *Expeditions Unlimited* involved a libel claim, the court's reasoning, like that of this Court in *Barr* (see our opening brief, pp. 21-22), is applicable beyond that limited area. The District of Columbia Circuit explicitly "disagree[d]" with *Economou* and "view[ed] it * * * as illustrating the dangers of a doctrine providing only qualified immunity" (slip op. 6). The "rejection of *Barr*," the court said, "can only exacerbate an already serious problem of modern government—the tendency of bureaucrats to sit tight rather than take action likely to rile the individuals or groups being regulated" (*ibid.*).[6] "For every case of malicious governmental action potentially remedied by

[6]The District of Columbia Circuit also disagreed with the Second Circuit's conclusion "that *Barr* had been undermined by the Supreme Court's decisions in cases arising under 42 U.S.C. 1983" (slip op. 7-9).

The court in *Expeditions Unlimitea*, however, did distinguish between suits at common law and those alleging deprivation of "fundamental, constitutional rights" (*ibid.*). As we argued in our opening brief (pp. 57-59), such a distinction is untenable (see also slip op. 6-9, concurring opinion of Judge Robinson).

replacing *Barr* with a qualified immunity, hundreds if not thousands of other actions in the public interest may be deferred or omitted" (slip op. 11).[7]

CONCLUSION

For the foregoing reasons, as well as those stated in petitioners' opening brief, the judgment of the court of appeals, insofar as it reversed the dismissal of the complaint against petitioners, should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

[7]Respondent urges (Br. 10, 24, 54) that the judgment of the court of appeals should be reversed insofar as it affirmed the district court's dismissal of the suit against the Department of Agriculture and the Commodity Exchange Administration as barred by sovereign immunity. See the Statement in our opening brief, p. 9. But since (1) respondent did not file a cross-petition on this issue, and (2) the argument is not made as an alternative ground for affirmance of the judgment, the claim is not properly before the Court. Cf. *United States* v. *American Railway Express Company*, 265 U.S. 425, 435; *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226, n. 2

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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

This memorandum is submitted, pursuant to this Court's permission, to discuss the jurisdiction of the district court to entertain this suit.

Respondent's amended complaint (Para. 1, App. 156-157) states:

> This proceeding is brought in part pursuant to Section 1331, 2201, 2202 of Title 28 of the United States Code and the relevant provisions of the Federal Tort Claims Act 28 U.S.C. 1291 ff; Section 1583 of Title 42 of the United States Code; Section 10(b) of the Administrative Procedure Act (5 USC 703); and the First and Fifth Amendments of the Constitution of the United States and such other Constitutional and Federal laws as may be relevant hereto.

Under *Bell* v. *Hood*, 327 U.S. 678, we believe that respondent properly invoked the jurisdiction of the district court under 28 U.S.C. 1331, which gives the district courts jurisdiction over civil actions where the matter in controversy "arises under the Constitution, laws, or treaties of the United States." None of the other statutory provisions relied upon, however, confers jurisdiction.[1]

1. In *Bell* v. *Hood*, the plaintiffs brought a suit for damages against agents of the Federal Bureau of Investigation, based upon the latters' alleged violation of the plaintiffs' rights under the Fourth and Fifth Amendments. The district court dismissed the suit for lack of jurisdiction on the ground that it did not arise "under the Constitution or laws of the United States" within the meaning of 28 U.S.C. (1940 ed.) 41(1), the predecessor of 28 U.S.C. 1331. The court of appeals affirmed on the same ground.

This Court reversed. It held that "where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must

[1]Sections 2201 and 2202 of Title 28 are the Declaratory Judgment Act; this suit is not for declaratory judgment, but for damages (App. 161-162). The Federal Tort Claims Act, which is erroneously cited as 28 U.S.C. 1291 (which deals with the jurisdiction of the courts of appeals) and should be cited as 28 U.S.C. 1346 and 2672 *et seq.*, does not confer jurisdiction. It covers only suits against the United States, and this suit is against government officials personally. Section 1583 of Title 42 deals with the disposition of housing; if respondent intended to refer to 42 U.S.C. 1983, that Section does not avail him because it covers only suits against state and not against federal officials. Section 10(b) of the Administrative Procedure Act, now 5 U.S.C. 703, deals with judicial review of agency actions, and is similarly inapplicable.

entertain the suit" (327 U.S. at 681-682). The two possible exceptions were that "suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous" (*id.* at 682-683). The Court noted that the legal issue in the case "is whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments" (*id.* at 684), and that "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction" (*id.* at 685).

The Court also pointed out that

> jurisdiction * * * is not defeated * * * by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction [*id.* at 682].

The Court reaffirmed this principle in *Wheeldin* v. *Wheeler*, 373 U.S. 647, 649.

2. *Bell* v. *Hood* controls the present case. Four of respondent's ten causes of action (the First, Third, Fourth and Fifth, App. 159-160) alleged that the petitioners' actions violated respondent's rights either under the First Amendment or to due process of law. As we have noted (Reply Br. 3, n. 1), the question whether there is a cause for action for violations of the First and Fifth Amendments, like the similar issue in *Bell* v. *Hood*, has not been definitively decided. The issues here, as in *Bell* v. *Hood*, are not "wholly insubstantial and frivolous," and the causes of action based upon alleged violations of those constitutional provisions are not "so patently without merit as to justify * * * the court's dismissal for want of jurisdiction" (*Bell* v. *Hood, supra*, 327 U.S. at 683). Accordingly, although it may subsequently be decided that a cause of action does not exist for violation of those constitutional provisions, the district court nevertheless had jurisdiction to entertain this suit.

3. If, as we contend, the district court had jurisdiction over the four causes of action in respondent's complaint alleging violation of his constitutional rights, it also had jurisdiction over the remaining nonconstitutional claims under the doctrine of pendent jurisdiction. *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, cf. *Aldinger* v. *Howard*, 427 U.S. 1; *Moor* v. *County of Alameda*, 411 U.S. 693. Respondent's "state and federal claims * * * derive[d] from a common nucleus of operative fact" (*Gibbs, supra*, 383 U.S. at 725), namely, the action of the petitioners in initiating, prosecuting and deciding the administrative proceeding. "[C]onsidered without regard to their federal or state character, * * * [respondent's] claims are such that he would ordinarily be expected to try them all in one judicial proceeding" (*ibid.*). This being so, and "the federal issues" being substantial, "there is *power* in federal courts to hear the whole" (*ibid.*; emphasis in original, footnote omitted).

4. Since the district court had jurisdiction to entertain this suit, it was within that court's discretion to decide that the defendants were immune from suit without first deciding whether the complaint stated a cause of action. Petitioners moved to dismiss on the former ground (App. 163). The district court was not required on its own motion to decide the sufficiency of the complaint before passing upon petitioners' motion to dismiss on a different ground. If the court of appeals' judgment remanding the case is affirmed, petitioners could then move to dismiss the complaint for failure to state a claim upon which relief can be granted. Rules 12(b)(6) and 12(h)(2), Federal Rules of Civil Procedure.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

DOJ-1977-11

FOR ARGUMENT

Supreme Court, U. S.
FILED
NOV 16 1977
MICHAEL RODAK, JR., CLERK

No. 76-709

In the Supreme Court of the United States

OCTOBER TERM, 1977

EARL L. BUTZ, ET AL., PETITIONERS

v.

ARTHUR N. ECONOMOU, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

This memorandum is submitted, pursuant to this Court's permission, to discuss the jurisdiction of the district court to entertain this suit.

Respondent's amended complaint (Para. 1, App. 156-157) states:

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1. In *Bell* v. *Hood*, the plaintiffs brought a suit for damages against agents of the Federal Bureau of Investigation, based upon the latters' alleged violation of the plaintiffs' rights under the Fourth and Fifth Amendments. The district court dismissed the suit for lack of jurisdiction on the ground that it did not arise "under the Constitution or laws of the United States" within the meaning of 28 U.S.C. (1940 ed.) 41(1), the predecessor of 28 U.S.C. 1331. The court of appeals affirmed on the same ground.

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Respectfully submitted.

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MOTION FILED
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Petitioners,

v.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION AND SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

LAW OFFICES OF DAVID C. BUXBAUM, P.C.
DAVID C. BUXBAUM
Attorney for Respondents
11 Broadway, Suite 1612
New York, New York 10004
(212) 425-4347

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MOTION FOR LEAVE TO FILE A SUPPLEMENTAL MEMORANDUM

Respondents, by their attorneys, Law Offices of David C. Buxbaum, P.C., move this Court for leave to file a supplemental brief, a copy of which is attached hereto on the grounds that during oral argument the Court was inadvertently misinformed by opposing counsel as to the federal practice and authority in paying claims against federal employees.

A. Inadvertent Misinformation Imparted to the Court

During the oral argument of this action, attorney for the petitioners, Daniel M. Friedman, Esq., Deputy Solicitor General of the United States of America, was questioned

by the Court as to whether federal officials, subject to civil suit for actions within the scope of their authority, were reimbursed by federal authorities, if a court awarded damages against said defendants. To the best of attorney for respondents' recollection, attorney for petitioners responded that he had been informed that there was no authority for such reimbursement, and that consequently such reimbursement was not made.

Attorney for respondents believes that the Court was inadvertently misinformed in that such authority does exist and such reimbursement is, in fact, apparently commonly made.

Therefore, in the interests of justice and in order that the Court be fully and accurately presented with the facts prior to reaching a decision in this case, attorney for respondents has prepared a brief supplemental memorandum discussing, in outline form, this one limited issue. Said brief is submitted to this Court for its consideration.

B. Petitioners' Filing of a Reply Brief

As further reason for granting respondents' motion, counsel for respondents asserts that he did not receive petitioners' reply brief in this case until two days before the oral argument of this matter. (*Cf.*, Supreme Court Rule 41, paragraph "3".) Counsel for respondents had virtually no time to prepare the issues presented by said reply brief.

Respondents, therefore, pray that this Court permit respondents to file their supplemental memorandum, prepared only to rectify an inadvertent impression given the Court during oral argument.

Wherefore, respondents respectfully request that they be granted leave to file this supplemental brief and that the attached supplemental memorandum be accepted by the Court.

Dated: New York, New York
November 21, 1977

Law Offices of David C. Buxbaum, P.C.
Attorneys for Respondents

By: /s/ David C. Buxbaum
David C. Buxbaum
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(212) 425-4347

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SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

The Federal Government Routinely Defends Government Employees and Can and Does Immunize Them or Reimburse Them, or Pay for Judgments Rendered Against Them.

A. The Basis of Federal Authority in Assuming Responsibility for Payment of Damages Assessed Against Federal Officials for Civil Wrongs

"It has been held that where an officer or employee of the Government is sued because of some official act done in the discharge of an official duty the expense incurred by him in the discharge of such duties should be borne by the United

States. *See,* 15 Comp. Dec. 621; 9 Op. Atty. Gen. 51, 52; *id.,* 146, 148. *Cf.* 31 Comp. Gen. 246." Op. Comp. Gen. B-147769, 44 Comp. Gen. 312 (1964). *See also,* Jayson, *Handling Federal Tort Claims; Administrative and Judicial Remedies* (§ 178.02 1970 looseleaf); Schwartz and Jacoby, *Litigation With the Federal Government,* p. 287 (1970).

"[A] practical equivalent of sovereign immunity is to . . . reimburse [the official] for any judgment." *Litigation With the Federal Government, supra,* at p. 287. And, as far back as 1804, in *Little* v. *Barreme,* 6 U.S. (2 Cr.) 170 (1804), the Government "assumed the judgment, and paid it with interest and all charges." 9 Op. Atty. Gen. 51, 53.

This reimbursement is provided in at least two different ways—by withdrawing money from an appropriations account, Op. Comp. Gen. B-147769, 44 Comp. Gen. 312 (1964), or by having Congress pass a private bill, Jayson, *Handling Federal Tort Claims, supra,* at § 178.02.

B. Provision for Counsel in Civil Cases

In addition to eventually paying the judgment obtained against federal officials, the Government also invariably provides defense counsel for such officials, as was acknowledged by counsel for petitioners at oral argument. *See also,* Schwartz and Jacoby, *supra,* at 287 ("Another practical equivalent of sovereign immunity is to provide the officer with defense counsel. . . ."); Jayson, *supra,* at § 178.02 ("[T]he Department of Justice will *normally* appear and defend the employee, the United States Attorney acting as his lawyer. . . .") (emphasis supplied).[1]

[1] "This is done not by specific dictate of any statute, but pursuant to the [Justice] Department's general policy—*whenever* a government employee is sued in his personal capacity for acts done in the course of official duty, the [Justice] Department will, on his or his agency's request, appear and represent him in court. *Cf.* 28 U.S.C. § 507." *Id.* (Emphasis supplied.)

> ". . . it has been the uniform practice of the Federal Government, ever since its foundation, to take upon itself the defense of its officers who are sued or prosecuted for executing its laws. The following are some of the cases in which this has been done: *Mitchell* v. *Harmony,* 13 How., 115; *Elliott* v. *Swartwout,* 10 Pet., 137; *Tracy* v. *Swartwout,* 10 Pet., 80; *Lawrence* v. *Allen,* 7 How. 785; *Same* v. *Caswell,* 13 Howard, 488; *Greely* v. *Thompson,* 10 How., 225; *King* v. *Maxwell,* 17 How., 147; *The United States* v. *Guthrie,* 17 How., 284; *The United States* v. *Booth,* 18 How., 476; *Greely* v. *Burgess,* 18 How. 413; *Stairs* v. *Peaslee,* 18 How., 521; *Gelston* v. *Hoyt,* 3 Wheat, 247; *Fleming* v. *Page,* 9 How, 603; *Kendall* v. *The United States,* 12 Pet., 51; *Marbury* v. *Madison,* 1 Cr., 137." 9 Op. Atty. Gen. 51, 52-53 (1857).

This policy has continued to this day. *See, Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388, 391 (1971).

C. Provision for Counsel in Criminal Cases

Besides representing and reimbursing federal officials, the Justice Department has recently announced that it would, under certain circumstances, pay the legal fees of federal officials that it prosecutes criminally:

> "There may be circumstances in which, at the conclusion of criminal proceedings, it would be appropriate for the department to consider reimbursement of an employee for payments made to counsel in connection with those proceedings." *New York Times,* Sunday, November 13, 1977, p. 26.

D. Reimbursement by Use of Agency Appropriation

One example of the appropriation account method is the case of *Giancana* v. *Johnson,* 335 F.2d 372 (7th Cir. 1964), *cert. den.* 379 U.S. 1001 (1965), where a Federal Bureau of Investigation agent was ordered fined, and he was later reimbursed for the fine from the appropriation to the

Federal Bureau of Investigation for "Salaries and Expenses". Op. Comp. Gen. B-147769, 44 Comp. Gen. 312 (1964).

E. Reimbursement by Private Bill

The private bill alternative is also available, as is made clear by Jayson, *Handling Federal Tort Claims, supra,* where it is stated that:

> ". . . if the United States escapes liability on jurisdictional ground and judgment is obtained against the employee . . . there is a possibility that the employee's agency would support a private bill to indemnify or reimburse him for his monetary obligation to the claimant." at § 178.02 (footnote omitted).

The passage of such private relief bills is employed when federal officials are found liable for money damages.

> "In this respect the power of Congress is almost limitless. Its authority stems from the constitutional provision empowering it to pay the debts of the United States [Art. I § 8]. The Supreme Court has interpreted this power very broadly, as including debts or claims 'which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual.'" *Id.,* at § 21.01, quoting *United States* v. *Realty Co.,* 164 U.S. 427, 440-441 (1896) (footnotes omitted).[2]

[2] Some examples of such private bills reimbursing federal employees for judgments recovered against them as individuals acting within the scope of their duty are: Private Law 89-255, 80 Stat. 1630 (reimbursing an employee of the Agricultural Research Service of the United States Department of Agriculture for a compromise settlement in a suit brought against him); Private Law 89-263, 80 Stat. 1635 (reimbursing an employee of the Post Office Department for a judgment rendered against him); Private Law 89-287, 80 Stat. 1644 (reimbursing a United States Post Office Department employee for a judgment rendered against him).

F. Direct Private Bill Relief to Claimants

In addition to the above-mentioned involvements of the Federal Government, there is another use of the private bill which must be referred to. The

> ". . . private bill may provide or facilitate a remedy in many ways. It may remove an existing statutory bar to the claim as by waiving the statute of limitations; it may refer the claim to the chief commissioner of the Court of Claims for judicial investigation and report back to Congress; *it may confer jurisdiction on a federal court to hear and determine the claim where no such jurisdiction otherwise exists;* it may increase or remove entirely the ceiling on an agency's administrative settlement authority for purposes of a particular claim; it may authorize a government official to hear, determine, and settle claims arising out of a particular incident; *it may direct the payment of a sum certain to the claimant in satisfaction of the claim* or it may provide relief in still some other form." Jayson, *supra,* at § 21.01. (footnotes omitted) (emphasis supplied)

In *Mizokami* v. *United States,* 414 F.2d 1375, 1377 (Ct. Cl. 1969), the Court of Claims commented as follows concerning private relief laws conferring jurisdiction on that Court:

> "Past special jurisdictional acts can be placed on one of two general categories. One type of act is designed merely to waive some affirmative defense which the United States could presumably otherwise effectively plead. Such acts have waived defenses based on statutes of limitations as well as those based on the principles of res judicata.
>
> "The other type of act additionally embraces an admission of liability by the United States and leaves a greater or lesser number of the factual and legal

questions relating to damages for the court." (footnotes and citations omitted).

An example of a private bill directing payment directly to the claimant is Private Law 87-552, 76 Stat. 1359 (1962), directing payment of a sum of money to a claimant whose automobile was seriously damaged in a collision with an Army truck. Since the Army driver was outside the scope of his employment at the time, the claimant was not entitled to relief under the Federal Tort Claims Act. *See also,* Private Law 87-579, 76 Stat. 1369 (1962), awarding damages for injuries sustained by claimant while a patient in a United States Army Hospital in Korea.

G. Relief to Federal Officials by Amendments to the Federal Tort Claims Act

Another method by which the federal government assumes responsibility for suits against federal officials is by periodically broadening the coverage of the Federal Tort Claims Act. Such amendments are made after commencement of suits against a particular type of federal official.

1. *Federal Automobile Drivers*

For example, the Drivers' Liability Act, 28 U.S.C. § 2679 (b)-(e), added in 1961 by Pub.L. 87-258, 75 Stat. 539, as amended July 18, 1966, Pub.L. 89-506, § 5a, 80 Stat. 207, was passed

> ". . . in order to provide a method for the assumption by the Federal Government of responsibility for claims for damages against its employees arising from the operation by them of vehicles in the scope of their Government employment. . . . [T]o meet the problem of personal liability in suits for damages to which employees of the Federal Government are subject as a result of their operation of motor vehicles in the performance of official duties." 1961 U.S. Code Cong. and Admin. News, p. 2784, 2785.

2. *Federal Doctors and Dentists*

With the commencement of negligence and malpractice suits against doctors and dentists in federal employ, Congress quickly amended the Federal Tort Claims Act to include these officials.

For example, 38 U.S.C. § 4116 (added in 1965 by Pub.L. 89-311, as last amended October 21, 1976, Pub.L. 94-581, §§ 110(11), 209(a)(7), 210(c)(8)(A), 90 Stat. 2849, 2861, 2864, making suit against the United States Government the exclusive remedy in suits against certain medical officials, in order to protect medical personnel of the Department of Medicine and Surgery of the Veterans' Administration from malpractice and negligence suits brought against them for their acts or omissions while in the exercise of their duties, 1965 U.S. Code Cong. and Admin. News, p. 3925, 2938); 42 U.S.C. § 233 (added in 1970 by Pub.L. 91-623 § 4, 84 Stat. 1868, and renumbered November 18, 1971; Pub.L. 92-157 § 301(c), 85 Stat. 463, to immunize medical personnel of the Public Health Service from civil actions or proceedings for performance of surgical, dental or related functions while acting within the scope of their office or employment and making suit against the United States Government the exclusive remedy for such actions); 22 U.S.C. § 817 (added in 1976 by Pub.L. 94-350, § 119, 90 Stat. 827, "extending to State Department (and also AID) medical personnel protection against civil suits for acts of alleged medical malpractice performed while acting within the scope of their employment," 1976 U.S. Code Cong. and Admin. News, p. 1555, 1565).

3. *Law Enforcement Officers*

Similarly, law enforcement officers, who have been the subject of civil damage acts, were covered by the Federal

Tort Claims Act in 1974 by 28 U.S.C. § 2680(h) (added in 1974 by Pub.L. 93-253, 88 Stat. 50, in order to protect investigative and law enforcement officers by "provid[ing] a remedy against the United States for [their] *intentional* torts. . . ." 1974 U.S. Code Cong. and Admin. News, p. 2789, 2790) (emphasis supplied).

H. Recent Legislative Proposal to Congress

The Attorney General has recently proposed legislation "to amend Title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, and for other purposes." H.R. 9219; S. 2117.

In a letter to the Speaker of the House of Representatives, Mr. Bell stated that:

> "The purposes of the proposed legislation are threefold: first, to provide the victims of common law and 'constitutional torts' committed by federal employees with a remedy against a financially responsible defendant; second, to protect federal employees from suits for money damages arising out of the performance of their duties; and, third, to eliminate the need for the Department of Justice to hire private attorneys to represent individual federal employees against whom such suits might be brought."

The proposed legislation makes several amendments to Title 28 of the United States Code.

The major amendments pertain to expanding the coverage of the Federal Tort Claims Act by making the United States Government solely liable primarily for the so-called "constitutional torts" of its employees acting within the scope of their office or employment, or under the color thereof. The sections in which amendments have been proposed include 28 U.S.C. §§ 1346(b), 2672, 2675(a), 2679(b) and (d) and 2680(h).

CONCLUSION

As has been shown, the United States Government has the authority, which it generally exercises, to reimburse federal officials for damage judgments rendered against them. The means of exercising this authority includes provision for counsel in both civil and criminal cases, reimbursement by use of agency appropriation, reimbursement by private bill, and direct private bill relief to claimants, as well as relief to federal officials by amendments to the Federal Tort Claims Act. Moreover, the Department of Justice invariably defends such federal officials or reimburses the official for expenses incurred by said official in defending himself.

Therefore, it is respectfully submitted that even under present policy, the United States Government is almost invariably responsible for damage claims against federal officials, and thus said federal officials are not themselves required to pay for their own common law or "Bivens" type torts.

Dated: New York, New York
November 21, 1977

Respectfully submitted,

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EARL L. BUTZ, ET AL., PETITIONERS

v.

ARTHUR N. ECONOMOU, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM
FOR THE RESPONDENTS

PRELIMINARY STATEMENT

This memorandum is submitted pursuant to this Court's direction. The petitioners have submitted a memorandum, a draft of which was received by respondents today, and respondents requested of the Chief Clerk an opportunity to submit their own memorandum and were informed they could do so and that a typewritten copy would be acceptable.

I. THE DISTRICT COURT HAD JURISDICTION OVER THIS MATTER UNDER 28 U.S.C. § 1331.

Plaintiffs, in their complaint, paragraphs "1", "13", "14", "15", "18", "19" and "20", alleged that they were deprived of their First and Fifth Amendment Constitutional rights. Clearly such an allegation is within the ambit of 28 U.S.C. § 1331, which confers original jurisdiction on the district court "wherein the matter in controversy. . .arises under the Constitution. . .of the United States. . . ."

In the landmark case of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), this Court held that 28 U.S.C. § 1331 embraces civil damage actions brought as a result of the deprivation of a Constitutional right. The Court in Bivens was presented with a Fourth Amendment violation, but there is no language in the opinion which limits the Court's holding to Fourth Amendment cases.

Rather, the language of the opinion is broad enough to encompass all Constitutional rights:

> "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interest in liberty. See, Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536, 540 (1927); Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900); J. Landynski, Search and Seizure and the Supreme Court 28 et seq. (1966); N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 43 et seq. (1937); Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U. Pa. L. Rev. 1, 8-33 (1968); cf. West v. Cabell, 153 U.S. 78 (1894); Lammon v. Feusier, 111 U.S. 17 (1884). Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But 'it is. . .well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' Bell v. Hood, 327 U.S., at 684 (footnote omitted)." Bivens, supra, at 395-396.

Moreover, Mr. Justice Harlan's characterization of the issue presented in Bivens as addressing the "power [of federal courts] to award damages for violation of 'constitutionally protected interests'" such as the Fourth Amendment is further support for a broad reading of Bivens. Id. at 399 (Harlan, J. concurring in the judgment). Mr. Justice Harlan went on to state:

> "The judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. To be sure, 'it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' Missouri, Kansas & Texas R. Co. v. May, 194 U.S. 267, 270 (1904). But it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes." Id. at 407 (Harlan, J., concurring in the judgment). (emphasis supplied).

The overwhelming majority of the lower courts to consider the question have held that Bivens is not so restricted.[1]

1/ See, Dellums v. Powell, C.A.D.C. No. 75-1974, decided August 4, 1977 (First Amendment); Davis v. Passman, 544 F.2d 865, 873 (5th Cir. 1977) (Fifth Amendment); Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975) (Thirteenth and Fourteenth Amendments); Brault v. Town of Milton, 527 F.2d 730, at 732 (2d Cir. 1975) (Fourteenth Amendment), rev'd on other grounds, 736 F.2d 527 (2d Cir. 1975) (en banc); Paton v. La Prade, 524 F.2d 863 (3d Cir. 1975) (First Amendment); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392 (6th Cir. 1975) (First Amendment); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 932 and n.5 (10th Cir. 1975) (Fifth Amendment); States Marine Lines Inc. v. Shultz, 498 F.2d 1146, 1156-1157 (4th Cir. 1974) (Fifth Amendment); Sullivan v. Murphy, 156 U.S. App.D.C. 28, 478 F.2d 938, 965 and n.47 (1973) (Fourth and Fifth Amendments), cert. denied, 414 U.S. 880, 84 S.Ct. 162, 28 L.Ed.2d 125; Braden v. University of Pittsburgh, 477 F.2d 1, 7 n.10 (3d Cr. 1973) (Fourteenth Amendment, dictum); United States ex rel. Moore v. Koelzer, 457 F.2d 1163, 1164-1165 (3d Cir. 1971), cert. denied, 404 U.S. 1061, 92 S.Ct. 747, 30 L.Ed.2d 749 (Fourth and Fifth Amendments); Panzarella v. Boyle, 406 F.Supp. 787 (D.R.I. 1975) (Fourteenth Amendment); Revis v. Laird, 391 F.Supp. 1133, 1139 (E.D.Cal. 1975) (First and Fifth Amendments); Patterson v. City of Chester, 389 F.Supp. 1093, 1096 (E.D.Pa. 1975) (First and Fourteenth Amendments); Brown v. Board of Education of City of Chicago, 386 F.Supp. 110, 121-122 and n.5 (N.D.Ill. 1974) (Fourteenth Amendment); Shaffer v. Wilson, 383 F.Supp. 554 (D.Colo. 1974) (Fourth and Fifth Amendments); Gardels v. Murphy, 377 F.Supp. 1389, 1398 (N.D. Ill. 1974) (First Amendment); Dahl v. City of Palo Alto, 372 F.Supp. 647 (N.D. Cal. 1974) (Fifth Amendment); Perzanowski v. Salvio, 369 F.Supp. 223, 229 (D.Conn. 1974) (Fourteenth Amendment); Butler v. United States, 365 F.Supp. 1035 (D.Haw. 1973) (First, Fourth and Fifth Amendments); Dupree v. City of Chattanooga, 362 F.Supp. 1136, 1139 (E.D.Tenn. 1973 1973) (Fourteenth Amendment); James v. United States, 358 F.Supp. 1381, 1386 (D.R.I. 1973), vacated, 502 F.2d 1159 (1st Cir. 1974) (Fourth, Fifth and Eighth Amendments, dicta); Washington v. Brantley, 352 F.Supp. 559, 564 (M.D.Fla. 1972) (Fourteenth Amendment and assumes arguendo that Bivens recognizes a cause of action for violation of all constitutionally protected interests, dicta); Johnson v. Alldredge, 349 F.Supp. 1230, 1231 (M.D.Pa. 1972) aff'd in part and rev'd in part on other grounds, 488 F.2d 820 (3d Cir. 1973) (Fifth Amendment); Howard v. Warden, Petersburg Reformatory, 348 F.Supp. 1204 (F.D.Va. 1972) (First and Ninth Amendments). See generally Dellinger, "Of Rights and Remedies: The Constitution as a Sword," 85 Harv.L.Rev. 1532, 1542-1543 (1972). Cf. Lipman v. Commonwealth of Massachusetts, 475 F.2d 565, 568 n.7 (1st Cir. 1973) (Fourteenth Amendment, dictum--no

As can be seen, every Circuit Court to pass on this question has given Bivens a broad reading, and that includes the Second, Third, Fourth, Fifth, Sixth, Tenth and District of Columbia Circuits (See cases cited n. 1, supra). The Second Circuit, the circuit in which this case was originally brought, has held that a cause of action exists for violations of the Fourteenth Amendment. Brault v. Town of Milton, 527 F.2d at 732.

Moreover, of the four decisions giving Bivens a limited reading, two of the opinions are authored by the same judge and his sole reason for declining to so interpret Bivens is that ". . .the Court is aware of no cases which have so held. . . ." Archuleto v. Callaway, 385 F.Supp. at 388 (per Matsch, D.J.). See also, Moore v. Schlesinger, 384 F.Supp. at 165 (per Matsch, D.J.).

The court in Smothers v. Columbia Broadcasting System, supra, also states as its reason for limiting Bivens that ". . .no court has ever sustained a case awarding damages based on a violation of the First Amendment. . . .This Court is not going to be the first to do so." 351 F.Supp. at 625-626.

Finally, in Davidson v. Kane, supra, which appears to be the first case to consider the scope of Bivens, the court, without presenting any analysis at all, stated that: "The holding [in Bivens] appears to be limited to the Fourth Amendment." 337 F.Supp. at 924.

In marked contrast to these cases which provide virtually no insight into the basis of their conclusion that Bivens applies solely to the Fourth Amendment, are the cases holding that it is not so restricted (See cases cited n. 1, supra.) These latter cases present persuasive and cogent analysis in support of the position that Bivens is not limited to Fourth Amendment cases.

(footnote 1 continued--)

direct reference to Bivens). But see, Archuleta v. Callaway, 385 F.Supp. 384, 388 (D.Colo. 1974); Moore v. Schlesinger, 384 F.Supp. 163 (D.Colo. 1974); Smothers v. Columbia Broadcasting System, 351 F.Supp. 622, 626 n.4 (C.D.Cal. 1972, dictum); Davidson v. Kane, 337 F.Supp. 922 (E.D. Va. 1972).

For example, in Dellums v. Powell, supra, the court, in holding that a cause of action exists for redress of First Amendment violations, went through the following analysis pertinent to the case at bar:

> "In Bivens Mr. Justice Harlan, concurring specially, indicated that 'courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights.' Yet he opined that '[t]he same, of course, may not be true with respect to other types of constitutionally protected interests, and therefore the appropriateness of money damages may well vary with the nature of the personal interest asserted.' It is apparently this language that has given courts pause in analyzing whether a right of action should be implied directly from the Constitution for redress of violations of interests protected by other than the Fourth Amendment. Given the intangible nature of the liberty interests at stake in many Fourth Amendment cases and the broad familiarity of federal courts with equitable relief for First Amendment violations, it is difficult to identify here the impediments feared by Mr. Justice Harlan. Indeed, the Supreme Court has recently approved in principle the award of reinstatement and back pay relief for violation of First and Fourteenth Amendment rights of a non-tenured schoolteacher. [Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 45 U.S. L.Week 4079, 4081-4083 (Jan. 11, 1977)] The unanimous Court dealt explicitly with the problem of causation and apparently found no difficulty in prescribing the elements of a cause of action and defenses thereto." C.A.D.C. No. 75-1974 at pp. 49-50. (footnotes omitted).

And, in Paton v. La Prade, supra, the court, again in holding that a cause of action exists for redress of First Amendment violations, stated that:

> "First amendment rights must be as personal to an individual as are fourth amendment rights. And '[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests.' Bivens, supra, 403 U.S. at 395, 91 S.Ct. at 2004. . . .
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> "Were there no cause of action for federal infringement of first amendment rights, an aggrieved individual could seek damages for violations of his first amendment rights by state officials, 42 U.S.C. § 1983, but not by federal officials. There is no reason to allow federal officials to act with impunity in this context and to bar state officials. The damage to the individual's first amendment interests is the same regardless of the perpetrator of the violation.
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> "Thus, we believe the extension of the Bivens rule to violations of first amendment rights to be both justifiable and logical." 524 F.2d at 870-871.

In a case dealing with Fifth Amendment rights, States Marine Lines, Inc. v. Shultz, supra, the court, in holding that a cause of action existed, used language squarely applicable in the instant case:

> "With one possible exception, nothing said in Bivens would limit the application of the principles enunciated therein to the case at bar. The single exception could be the court's statement that '[h]istorically damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.' 403 U.S. at 388. But subsequent to its decision in Bivens, the court has rejected, albeit in a different context, the artificial distinction between personal and property rights. Lynch v. Household Finance Corporation, 405 U.S. 538, at 552, 92 S.Ct. 113, 31 L.Ed.2d 424 (1972).[2] In Lynch the court allowed suit in federal court under 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), for the alleged deprivation of property pursuant to state law in violation of the equal protection and due process clauses of the Fourteenth Amendment. To permit a party to sue for the alleged deprivation of his property without due process of law by persons acting under color of state law and not permit a suit for damages against a federal officer for identical acts in violation of the identical provision in the Fifth Amendment can only be justified, if at all, by the fact that Congress specifically recognized the potential liability of state officers for their allegedly unconstitutional acts in 42 U.S.C. § 1983. But, in light of the court's decision in Bivens, the fact that Congress has not specifically recognized a cause of action for damages against federal officers is no longer an obstacle preventing federal courts from fashioning a damage remedy, where appropriate, directly from the Constitution. . . .The necessity and appropriateness of judicial relief is no less compelling in this case than it was in Bivens.

2/ In Lynch the court stated:

"Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." at 552.

As in Bivens: A common law or state tort remedy may or may not afford a means of redressing this wrong, but in any case, will not be tailored specifically to cases of lawlessness pursuant to federal authority; the claim presented is obviously appropriate for money damages; and other remedies such as injunctive or relief in the nature of mandamus are no longer viable alternatives." 498 F.2d at 1155-1156 (footnote supplied).

In Davis v. Passman, supra, the Court also used language appropriate to the instant case:

> "Although Davis's claim arises under the fifth amendment, not the fourth, we find no basis in Bivens' language or rationale for according any significance to this distinction. The rights protected by the fifth amendment due process clause are every bit as fundamental as fourth amendment rights. Here, as in Bivens, damages simply constitute 'a particular remedial mechanism normally available in the federal courts." 403 U.S. at 397, 91 S.Ct. at 2005." 544 F.2d at 873.

In addition, this Court, in a case claiming a violation of the Fourth Amendment, held that on the face of the complaint the federal court had jurisdiction because

> ". . .the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction." Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963), quoting Bell v. Hood, 327 U.S. 678, 685 (1946).

That this reasoning applies to the instant case is clear and therefore the district court had jurisdiction over this case.

The case of Jacobs v. United States, 290 U.S. 13 (1933), is worthy of mention. There the Supreme Court was faced with the question of whether claimants, in a suit under the Tucker Act, were entitled to interest on their damage award. In holding that the interest must be paid, the court stated:

> "The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. The right

> was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States." at p. 16. (emphasis supplied).

In addition to the violations of respondents' First and Fifth Amendment rights by petitioners, respondents also allege, in paragraph 19 of their complaint, that petitioners violated Section 9(a) of the Administrative Procedure Act, 5 U.S.C. 558(b), which provides that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." This allegation is also within the ambit of 28 U.S.C. § 1331, which confers original jurisdiction on the district court ". . .wherein the matter in controversy. . . arises under the. . .laws. . .of the United States. . . ."

Finally, in Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980 (1977), this Court, in holding that the Administrative Procedure Act "does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action," 97 S.Ct. at 985, also stated that "[t]he obvious effect of" eliminating the amount in controversy requirement for actions brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity "is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate." 97 S.Ct. at 984. In the case at bar, the District Court is in part asked to review allegedly wrongful acts of

a federal agency and its employees and determine the consequences of those wrongful acts.

Dated: New York, New York
November 21, 1977

Respectfully submitted,

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